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**R E P O R T S**  
**OF**  
**C A S E S**  
**ARGUED AND DETERMINED**  
**IN THE**  
**Court of King's Bench.**  
**VOL. II.**

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# REPORTS OF CASES

ARGUED AND DETERMINED

IN

## The Court of King's Bench,

WITH TABLES OF THE NAMES OF THE CASES  
AND THE PRINCIPAL MATTERS.

---

BY

GEORGE MAULE and WILLIAM SELWYN, ESQs.  
OF LINCOLN'S INN, BARRISTERS AT LAW.

---

*Sit ergo in jure civili finis hic, legitima atque usitata in rebus causisque  
civilium æquabilitatis conservatio.*

CICERO.

---

### V O L. II.

Containing the Cases of MICHAELMAS, HILARY, and EASTER Terms,  
In the 54th Year of GEORGE III. 1813—1814.

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L O N D O N :

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1815.

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**J U D G E S**  
**OF THE**  
**COURT OF KING's BENCH,**  
**During the Period of these REPORTS.**

**EDWARD Lord ELLENBOROUGH, C.J.**  
**Sir SIMON LE BLANC, Knt.**  
**Sir JOHN BAYLEY, Knt.,**  
**Sir HENRY DAMPIER, Knt.**

**ATTORNEY-GENERAL.**  
**Sir WILLIAM GARROW, Knt.**

**SOLICITORS-GENERAL.**  
**Sir ROBERT DALLAS, Knt.**  
**Sir SAMUEL SHEPHERD, Knt.**





A

# T A B L E

OF THE

## C A S E S   R E P O R T E D

IN THIS SECOND VOLUME.

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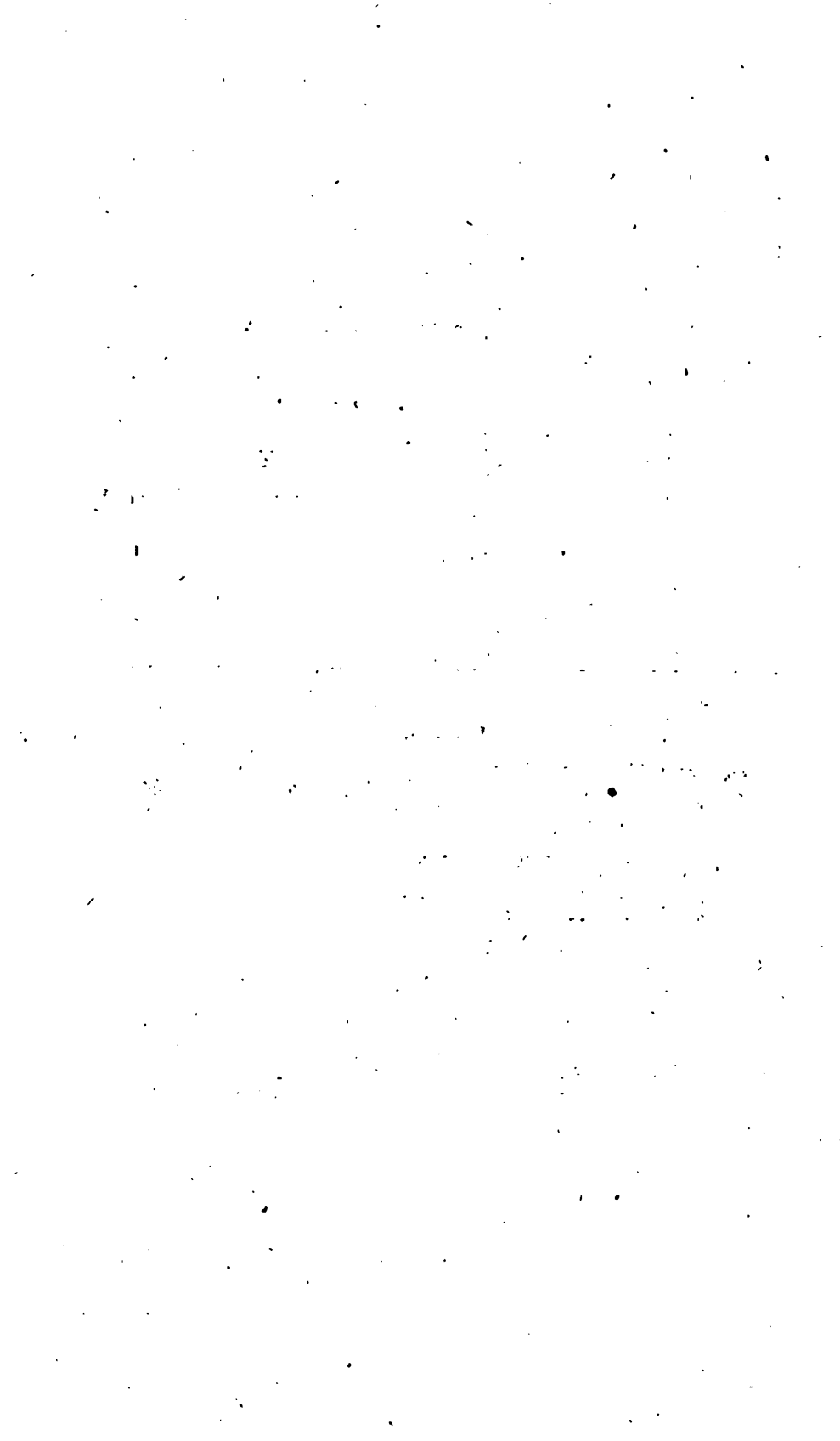
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## ERRATA.

- Page 47. n. (a), for 430 read 403.  
 112. marginal note, line 1. for *defendant's* read *defendants*.  
 125. line 17. for *commission* read *commision*.  
 152. line 6. for *thiiber* read *there*.  
 193. line 1. dele *of*.  
 211. line 12. for *non-pross* read *non-pros*.  
 245. line 14. for *thiiber* read *there*.  
 361. line 6. for *overflown* read *overflowed*.  
 428. line 4. for 53rd read 55th.



# C A S E S

ARGUED AND DETERMINED

1813.

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Fifty-fourth Year of the Reign of GEORGE III.

---

EVANS and Another *against* SOULE. (a)

Saturday,  
Nov. 6th.

**A**SSUMPSIT against the defendant, as a carrier by water from *Bristol* to *Worcester*, for not safely and securely carrying a quantity of sugar, but so carelessly and negligently conducting himself that by reason of his neglect to cause the vessel to be in proper

A carrier who had given notice that he would not be liable for loss or damage unless occasioned by the actual negligence of the

master or mariners, was held not to have waived that notice by having on former occasions made allowances to plaintiffs for damage, without enquiring into the cause of such damage.

(a) The Judges of this court sat at Serjeants'-Inn on *Monday* the 1st of *November*, and the two succeeding days, and heard this and several of the following cases, which will be noticed as they occur, argued by counsel, and delivered their opinions as upon a former occasion, (Vol. I. p. 304.) and the Court afterwards gave judgment on the days on which the cases are now reported.

VOL. II.

B

repair,



1813.

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 EVANS  
 against  
 SOULE.

repair, and by the negligence of himself and his servants in conducting it, the vessel was sunk and the sugar damaged and spoiled. The second count stated generally, that the defendant did not deliver the sugar at *Worcester*, and that it was lost through his negligence. Plea, general issue; and at the trial before *Thomson B.*, at the summer assizes 1812, for the county of *Gloucester*, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:

In *March* 1812 the plaintiffs, who resided at *Worcester*, shipped at *Bristol* on board a trow or vessel of the defendant, which was commonly employed in carrying goods for hire between *Worcester* and *Bristol*, a quantity of sugar to be carried along the course of the *Avon* and *Severn* navigation, and to be delivered to the plaintiffs at *Worcester*. The trow was staunch, tight, and seaworthy when she took in the cargo, and capable of carrying it; but after proceeding about two miles from the mouth of the *Avon* up the *Severn* to a road called *King-road*, in the course of her voyage from *Bristol* to *Worcester*, she suddenly sprung a leak, in consequence of which she sunk and the sugars were lost. This loss happened without any negligence of the defendant or his servants. The defendant had, about eight years before this accident, succeeded *Child* and Co. in the business of a carrier, on the river *Severn*, and until within a few years back carried it on under the same firm. In 1798 and 1799 a notice was advertized in the *Worcester* newspapers, where the office of *Child* and Co. was situated, which was also distributed through the country, acquainting the public that the proprietors of the trows never did consider them-

selves liable to make good any loss or damage arising from any accident or misfortune whatever, unless occasioned by the actual negligence of the master or mariners; neither were the rates of carriage understood to include any compensation for risk, but merely to defray the expence of such carriage; and to prevent any misunderstanding arising between them and their employers, they acquainted the public in general, That all goods shipped on board their vessels were and would continue to be carried by them at the risk of the respective owners, unless the loss or damage should arise through the actual default of the master or mariners employed by them. Signed by *R. Child* and the then proprietors.

1813.

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 EVANS  
 against  
 SOUTHERN

A copy of this notice was likewise kept hung up in a conspicuous part of the office of the defendant at *Worcester*, which was the same office where the business was carried on in *Child's* time, and the plaintiff *Evans*, before the time when the sugars were shipped, had notice of its contents. The plaintiffs had, on former occasions, in many instances sent goods by the defendant's trows or barges employed in like manner as this vessel in carrying goods for hire between *Bristol* and *Worcester*, upon some of which occasions the goods while on board the trows or barges had in the course of their voyage received damage from water, and sometimes had been delivered short in quantity. On those occasions the defendant upon reviewing and ascertaining the extent of the damage, without making any enquiries as to the cause, made an allowance to the plaintiffs in respect thereof. This happened four times within the last year and a-half, at one of which the defendant made an allowance for two cwt. of sugar

1813.

EVANS  
against  
SOMER.

which had been damaged by water at the rate of 14s. per cwt. The average rate of freight for the voyage in question is 12s. per cwt., and the average rate of insurance only from 1l. 2s. to 1l. 3s. per cwt.

The question for the opinion of the Court is, whether under these circumstances the plaintiffs are entitled to recover? if the Court should be of opinion that they are, then the verdict entered for the plaintiffs is to stand; if not, then a verdict to be entered for the defendant.

*W. E. Taunton*, for the plaintiff, said that he could not contend after the cases of *Gibbon v. Panton* (a), and *Nicholson v. Willan* (b), that it was not competent to a carrier by means of a notice, to make a special acceptance of goods delivered to him for hire; but he argued that in this case the defendant had waived his notice, by dealing with the plaintiffs upon the footing of there being no such notice, viz. by settling with them for losses on former occasions, against which he might have protected himself by the notice. And he cited *Cobden v. Bolton*. (c)

Lord ELLENBOROUGH C. J. The case does not state that on those occasions there was an absence of all negligence; and if it did would it amount to more than this, that the defendant carelessly settled his accounts. He might think that some negligence had taken place, and might therefore make an allowance, but that will not estop him on all future occasions. It is a strong circumstance that the notice was continued hanging up

(a) 4 Burr. 2298.

(b) 5 East, 507.

(c) 2 Camp. N.P.C. 108.

in the same office where *Child* and Co. formerly carried on the business: it must be taken therefore as an adoption of the same course of business. As to *Cobden v. Bolton*, to be sure if a party will say Yea and Nay at one and the same time, his meaning will not be easily understood. That was the reason why the notice in that case was held a nullity.

1813.

---

 EVANS  
against  
SOULE.

*Puller* was to have argued for the defendant.

*Per Curiam*, Judgment for the Defendant.

GOODTITLE, on the Demise of EDWARD WOODHOUSE, and JAMES THOMAS, and ANN his Wife, against JOHN MEREDITH (a).

Saturday,  
Nov. 6th.

**EJECTMENT** for certain premises, situate in the parish of *Pype* and *Lyde*, in the county of *Hereford*. At the trial before *Graham B.* at the last *Lent* assizes for that county, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case:

*James Woodhouse* being seised in fee of the several estates hereinafter mentioned by his will, bearing date the 28th of *March* 1806, duly attested to pass real estates, devised to his mother and two brothers certain rent-

A codicil signed by the testator and attested by three witnesses "to be taken as part of his will," is a republication of the will so as to make the will pass lands contracted for before, but conveyed between the date of the will and codicil. Devise of all and singular

other his freehold, copyhold, and leasehold messuages, farms, lands, tenements, and hereditaments whatsoever and wheresoever, not before devised, equally between *W.* and *T.* for their joint lives, remainder to the children of *M.* and their heirs male and female, was held to pass a life estate to *W.* and *T.* in the after-purchased lands, notwithstanding a subsequent devise of "all the rest and residue of all his real estate not before disposed of, and all other his estates and interests whatsoever vested in him as mortgagee or trustee under any deed, or will, or otherwise howsoever, and of all the rest and residue of his personal estate to his wife, her heirs, executors," &c.

(a) This case was argued at *Serjeants'-Inn*.

1813.

GOODTITLE  
against  
MEREDITH.

charges payable out of his messuage, farm, and lands, called *Clifford Priory*, for the term of their lives, and as to the freehold and inheritance of the said priory, subject to the said rent-charges, he devised the same, and also all the pieces of land called *Knappa Ruff* and *Widenhams*, and a messuage and lands, &c., which he lately bought of the Governors of *Guy's Hospital*, and all other his freehold, copyhold, and leasehold messuages, farms, lands, tenements, and hereditaments whatsoever and wheresoever, in the county of Hereford, and in the town of Kensington in the county of Middlesex, or elsewhere in the kingdom of Great Britain, to his wife *Ann Woodhouse*, for the term of her natural life, she keeping the same in repair, &c., and from the determination of that estate to *Fred. Sam. Secretan* and *John Meredith*, in trust to support contingent remainders during her life, and from and after her decease he devised all and singular his messuages, farms, lands, and tithes called the *Priory*, *Knappa Ruff*, *Widenhams*, and *Welchwood*, to *F. S. Secretan* and *Mary* his wife, for and during their joint lives and the life of the survivor, remainder to trustees to support contingent remainders; and after their several deceases, unto all the children of *F. S. Secretan* and *M.* his wife, already or hereafter to be born of their bodies, whether male or female, for their joint lives and the life of the survivor; remainder to trustees to support contingent remainders; and from and after the several deceases of the children, unto and between all their issue, male and female; and for want of such issue, unto and equally between all the children of *Edward Woodhouse* and the children of *Ann* the wife of *James Thomas*,  
and

and their heirs, male and female, with the same restrictions as before limited; and for want of such issue, unto and equally between all the children of *John Meredith* and *Bridgewater* his wife, and their heirs male and female, with the same restrictions. The testator then also gave and devised all and singular other his freehold, copyhold, and leasehold messuages, farms, and lands, tenements, hereditaments, tithes, and premises whatsoever and wheresoever, situate in the counties of Hereford and Middlesex, or elsewhere, and not before by him given and devised unto and equally between his cousins *Edward Woodhouse* and *Ann the wife of the said James Thomas*, for and during their joint lives and the life of the survivors of them; remainder to the said trustees, in trust to support contingent remainders, during the lives of *Edward Woodhouse* and *Ann Thomas*; and from and after their several deceases, he devised all the said freehold, leasehold, and copyhold messuages, farms, lands, tithes, and hereditaments unto and equally between all the children of the said *E. Woodhouse* and the wife of the said *J. Thomas* and *Mary* the wife of the said *F. S. Secretan*, whether male or female, already or hereafter to be born, for and during their joint lives, share and share alike; remainder to the said trustees to preserve contingent remainders during their lives; remainder unto and equally between all the children of the said *J. Meredith* and *B. Meredith*, and their heirs male and female, with the same restrictions as before limited. Then he devised to his wife his term and interest in the lease of a farm at *Lower Lyde*, in the parish of *Pype* and *Lyde*, for her life, together with all his stock thereon, &c.; and after several other

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bequests, he devised also to his wife *all the rest, residue, and remainder of all his real estate not before disposed of, and all other his estates and interests whatsoever* vested in him as mortgagee or trustee under or by virtue of any deed or will or otherwise howsoever, and all the rest, residue and remainder of all his personal estate, ready money, and securities for money, debts, bills, notes, and all other his chattels, effects, and personal estate whatsoever and of what nature, kind, or quality soever, *to hold to his said wife, her heirs, executors, administrators, and assigns, subject to the payment of his debts and funeral expences.* The testator appointed his wife, *F. S. Secretan*, and *J. Meredith*, executrix and executors of his will. Afterwards, on the 12th of *January* 1809, the testator made a codicil to his will, attested by one witness, by which he appointed an additional executor, and disposed of some of his personalty, &c.

The testator afterwards, on the 14th of *January* 1809, made the following codicil to his will, which was duly attested by three witnesses, and began thus; “ A codicil, *to be taken as part of the last will and testament of me James Woodhouse,*” &c.; by which codicil, after the decease of his wife, he devised to his brother *Joseph Woodhouse*, and his clerk *James Woodhouse*, for their lives, his dwelling-house in *Buy-street* in the city of *Hereford*, and all his messuages, farms, and lands at *Holmer* and *Tapsley*, and after their several deceases, he devised the same equally between the children of the said *Joseph Woodhouse* and *James Woodhouse*, and his cousin *Edward Woodhouse*, their heirs and assigns, as tenants in common and not as joint-

joint-tenants; and he also bequeathed out of his personal estate several legacies to be paid to the legatees within six months next after his decease: and the codicil concluded thus: "In witness whereof I have to this my codicil, *which I desire may be taken as part of my will*, set my hand and seal this fourteenth day of January 1809."

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The testator died on the 16th January 1809, leaving his wife *Ann Woodhouse* him surviving, who is since dead: Between the dates of the will and codicils, viz. on the 18th of April 1806, the premises in dispute in this ejectment were duly conveyed to the testator by feoffment, with livery of seisin, (he having previously contracted for the same by articles of agreement on the 6th of September 1805.) The defendant, on the death of *Ann Woodhouse*, the widow, became possessed of the premises, and still retains the possession. The lessors of the plaintiff, *E. Woodhouse* and *A. Thomas*, are the devisees named in the will, and claim as such.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover; if he is, the verdict is to stand; if not, then a verdict is to be entered for the defendant.

*Puller*, for the plaintiff, made two points; first, that the codicil of the 14th of January, executed after the making of the will and conveyance of the lands, amounted to a republication, and passed the after-purchased lands; and he said that it was so determined in *Acherley v. Vernon* (a), *Barnes v. Crowe* (b), and *Piggott v.*

(a) *Com. R.* 381.(b) 1 *Ves. jun.* 486. 4 *Br. Ch. R.* 2.



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*Waller* (a); and that in the first of those cases Lord *Maclesfield* did not adhere to the rule he had before laid down in *Penfrase v. Lord Lansdowne* (b). So in *Holmes v. Coghill* (c), and *Lane v. Wilkins* (d), though it was held that a codicil was not, by the mere effect of republishing the will, an execution of a power subsequently acquired, yet it was admitted that a codicil confirming a will of lands generally, would pass lands purchased in the interval. And in *Bowes v. Bowes* (e) the general rule was not denied, but the codicil being restrained to the *said* lands, lands purchased after the will were adjudged not to pass; though even there Lord *Thurlow* was of opinion that the introduction of the word *said* ought not to control the operation of the codicil. But here the effect of the codicil is not restrained by the manner in which it is expressed, and therefore it must be taken to give effect to the will in respect of the after-purchased lands. And this brings it to the 2d point, viz. that the lessors of the plaintiff take an estate for life in the premises under the devise made to them in the residuary clause of the will, notwithstanding the subsequent residuary clause in favour of the testator's wife. The first residuary clause uses words large enough to comprehend the premises, and it does not dispose of the whole estate, but of an estate tail only, for such, according to *Co. Lit.* 27. a. and to what Lord *Holt* laid down in *Fisher v. Wigg* (f), is the remainder to the children of J. and B. *Meredith* and *their heirs male and female*: there still

(a) 7 Ves. 98.

(b) Vin. Abr. Devise, Z 22.

(c) 7 Ves. 499.

(d) 10 East, 242.

(e) 2 Bos. &amp; Pull. 500.

(f) 1 Ld. Ra. 1630.

remains

remains therefore an undisposed of reversion in fee, which, according to *Doe v. Weatherby* (a), *Goodright v. Lord Downshire* (b), and *Goodtitle v. Miles* (c), will pass under the last residuary clause to the wife; and this construction will give effect to the whole, without taking away or abridging the interest given by the former residuary clause to the lessors of the plaintiff.

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*Campbell*, contra, argued, that supposing the codicil republished the will so as to make it operate upon the premises in question, still the lessors of the plaintiff did not take any interest under the residuary devise, because it was a devise to them of such premises only as were "not before given and devised," whereas the premises in question would be included in the former devise to the wife for life; and although a reversion would still be left, and in *Scott v. Alberry* (d) and *Ridout v. Pain* (e) it was held that under a residuary devise a reversion would pass, those decisions turned very much upon the effect given to the word *estate*. But upon the intention, it appears that the testator had at the time of his will only an equitable interest in the premises, by virtue of the articles of agreement; which equitable interest, it is submitted, neither passed by the first residuary devise to the wife, nor by the residuary devise to the lessors of the plaintiff, but the wife took the whole in fee under the last residuary devise to her. An equitable interest may be devised, and will be decreed in equity to the devisee; and the last residuary clause uses

(a) 11 East, 322. (b) 2 Bos. & Pull. 600. (c) 6 East, 494.  
(d) Com. Rep. 337. (e) 3 Atk. 486.

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apt words for the passing of such an interest, which shews that the testator intended it should pass under that clause; and that intention is farther shewn by his giving to his wife his personal estate, out of which the price of the after-purchased lands was to be defrayed. The Court therefore will give effect to such intention, whatever may be the supposed operation of the codicil. But as to the republication, it is not by any means an invariable rule that every codicil to a will has the effect of making the will speak as of the date of the codicil, though it may undoubtedly have that effect according to the intention of the party making it; but it is always a question of intention. So at least the Master of the Rolls is reported to have said in *Pigott v. Waller*, and that the old rule as it stood before *Acherley v. Vernon* was the better. And in most of the cases where the old rule has been departed from, it will be found that there was some peculiarity to lead to a different rule of construction. Thus in *Potter v. Potter (a)* the testator declared that he did republish; in *Barnes v. Crowe* the words of the original devise looked beyond the time present, viz. "that he might die seized or possessed of;" and on that the Court observed: so in *Doe v. Davy (b)* the testator by his codicil ratified and confirmed all bequests and devises contained in the will. But in *Lady Strathmore v. Bowes (c)*, where the intention, as it was collected from the codicil, appeared to be different, this Court, and afterwards the Judges on error agreed, that it was not a republication so as to affect after-purchased lands; and *Holmes v. Coghill*, and *Lane*

(a) 1 Ves. 437.

(b) Cowp. 158.

(c) 9 T. R. 482.

*v. Wilkins* must have been decided otherwise, if the rule had not been considered as a rule of intention. Here no intention is manifested by the codicil, which was made for special purposes only, to prefer the lessors of the plaintiff as to the after-purchased lands to the family of the *Secretans*, who were preferred to them in a former part of the will; yet such will be the effect of holding the codicil a republication.

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*Puller* in reply, said, that a particular intent to republish need not appear; and so it was understood by Lord *Hardwicke* in *Gibson v. Montfort* (a); though Lord *Camden* supposed the contrary in *The Attorney-General v. Downing* (b): the general rule according to *Barnes v. Crowe* was, that a codicil attested by three witnesses shall be a republication of the will drawing down the date of the will to that of the codicil; and a particular intent to the contrary, as in *Bowes v. Bowes*, must be shewn in order to form an exception.

LORD ELLENBOROUGH C. J. The question in this case is, whether the lessors of the plaintiff take an immediate legal estate; for if not immediate, they would have no ground to stand on in a court of law. That is the first question. As to the other question, what the effect of the codicil is, that has been settled in a series of cases, beginning with *Acherley v. Vernon* down to *Barnes v. Crowe*, and, lastly, in a more recent case of *Pigott v. Waller*. The effect,

(a) 1 Ves. 492, 3.

(b) Amb. 571.

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of all these decisions is to give an operation to the codicil per se, and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless indeed a contrary intention be shewn, in which case it will repel that effect. Such was the case of *Bowes v. Bowes*, where the codicil devised the *said* lands; which word *said* was considered by the Judges as controlling the effect and operation of the codicil, confining it to those lands which would have passed under the will, as it originally stood, and not extending the will to all the lands at the date of the codicil. Subject only to this restriction, arising out of the intention implied from the use of the word *said*, that there the testator does not mean to pass the whole, the general effect of a codicil is to make the will speak as of its own date. There is nothing here to repel that effect, and therefore the will is brought down to a period subsequent to the purchase, and it contains expressions competent to pass the after-purchased lands. The codicil draws the will down to its own date in the very terms of the will, and makes it operate as if it had been then executed in those terms. Then the only question is, under the will, whether the lessors of the plaintiff take an actual estate; and it appears that they do take a life-estate, subsisting at the time of action brought; and there is no rule of law which stands in their way.

LE BLANC J. The principal question is, whether the second codicil brings down the will to the date of the codicil. I take it to be a settled rule, since *Acherley*

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*ley v. Vernon*, and the other cases, that it is not necessary that there should be an actual republication of the will, by its being before the testator at the time, and by his declaring that he means to republish it; but that if the codicil be properly executed, it shall be taken to operate as a republication of the will, so as to make the will speak as of the latter date. Now this codicil is stated to be "a codicil to be taken as part of the will," and there is no question made as to what will the testator referred to, for he does not appear to have made any other will; and he concludes the codicil thus: "In witness whereof I have to this my codicil, which I desire may be taken as part of my will, set my hand," &c. By this codicil he makes a different disposition of part of his property; the codicil, therefore, brings down the will to its own date, making the will to speak as of that date, and to pass lands which the testator had not at the date of the will, and which, but for the operation of the codicil, it would not have passed. It is now, therefore, the same thing as if the testator had had a legal estate in this property at the date of his will, and if he had had, a life-estate would have passed to his wife under the first residuary clause of the will, by which he gives to his wife an estate for the term of her natural life. Then comes the subsequent residuary clause, by which he gives all other his freehold, leasehold, and copyhold property, not before devised, to the lessors of the plaintiff for their lives. The wife having died, that estate comes into possession, and they are entitled to maintain this ejectment.

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BAYLEY J. I am entirely of the same opinion. It is an established rule that a codicil executed to pass real estate is *primâ facie* a republication of the will so as to pass after-purchased lands. The rule is so where the codicil relates to personal estate only (a), and therefore more especially when it relates to the passing of real estate; but taking it as a general proposition, it may be stated *primâ facie* to amount to a republication of the will. Upon the other point it has been endeavoured to put such a construction on this will, as not to give an estate for life in the premises to the wife under the first clause, nor to the lessors of the plaintiff under the second clause, but only an equitable estate in fee to the wife under the third. I do not think, however, that that would be a right construction, in any view of the case, because, supposing we had the power to look to the passing of equitable estates, it seems to me that the words of the residuary clause, which gives "all other his freehold, copyhold, and leasehold messuages, &c. whatsoever and wheresoever, &c., would have been sufficiently comprehensive to pass the equitable interest which the testator had at the time of his will. The whole of his will, as it seems to me, is perfectly consistent. First, the testator gives an estate to his wife for life, with remainder as to part in tail, which left a remainder in fee undisposed of. Under the second clause he creates other life estates, and estates tail, still without exhausting the fee; and then, under the third clause, he disposes of the fee. It has been contended that the personal property being given to the wife, it must have been the intention of the tes-

(a) *Piggott v. Waller*, 7 Ves. 98.

tator that she should take the estate meant to be purchased out of it; but the answer is, that he only gives the residue of the personalty; when, therefore, the testator gave to his wife his personalty, he intended that it should pass, subject to the charge of the purchase.

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DAMPIER J. I am of the same opinion. I think this the same as if the testator had had the will under his contemplation, and actually before him, at the time of executing the codicil; for the first and last sentences of the codicil expressly refer to the will. A long series of decisions, from *Acherley v. Vernon* down to the late case before the Master of the Rolls, has established the law upon this point. As to the other point, it must be contended that the effect of the last residuary clause is to except this particular estate out of the operation of the two former clauses, in order to give a fee to the wife; but before we give such an effect to it we ought to see a clear and manifest intention. Here the general intention seems to have been that all the real estate should go together. Under the first residuary clause it is given to the wife for life; but the whole fee not being exhausted, there was something for the second, and in the same manner for the last residuary clauses to operate on. But the argument is, that if the testator had died the day after making his will, this estate could not have passed in that manner; and as the fund out of which it was to be acquired was to be taken out of the personal estate, and the personal estate is given to the wife, therefore this estate shall also go to the wife: to which the answer has been given by my Brother *Bayley*; that he has given his per-



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sonality subject to these charges. After those charges are satisfied, by payment out of the personal estate, then comes the codicil, the operation of which is to dispose of the purchase as a part of the real property, which is not to be separated from the rest by an intention which at best is very doubtful. In my view of the case, therefore, the lessors of the plaintiff are entitled to the judgment of the Court.

Judgment for the Plaintiff.

Saturday,  
Nov. 6th.

KIRBY and Others *against* The Duke of  
MARLBOROUGH and Another. (a)

A bond entered into by *A.* and *B.* to the plaintiffs, to enable *A.* to carry on his trade, conditioned for the payment of all such sums not exceeding 3000*l.* which should at any time thereafter be advanced by plaintiffs to *A.*, is not a continuing guarantie to the extent of 3000*l.* for advances made at any time, but only a guarantie for advances once made to the extent of 3000*l.* Payments made generally to the plaintiffs on the account of *A.* may be applied by them in liquidation of a balance existing against *A.* before the execution of the bond, and *B.* cannot insist upon their being applied in exoneration of his liability on the bond, although at the time of his entering into it plaintiffs did not give him notice that any balance was then existing against *A.*

DEBT on bond for 6000*l.*, dated the 11th of March 1811. The defendant, *Coburn*, pleaded bankruptcy, and the plaintiffs entered a nolle prosequi as to him. The Duke of *Marlborough* let judgment go by default. Whereupon the plaintiffs set forth the condition of the bond, reciting that *Coburn* having occasion for divers sums of money, not exceeding in the whole the sum of 3000*l.*, had applied to the plaintiffs to advance the same at such times and in such parts and proportions as he might require, which they had agreed to advance on the Duke's entering into the said obligation jointly with *Coburn*, (to which the Duke, at the request of *Coburn*, had consented, to enable him (*Coburn*) to carry on the trade in which he

(a) This case was argued at *Serjeants'-Inn*.

was engaged, and to prevent the inconvenience that he would be put to if the advance were not made); it was therefore conditioned for the payment by *Coburn* and the Duke or either of them, their or either of their heirs, executors, or administrators, unto the plaintiffs, their executors, administrators, or assigns, of all such sum or sums of money, not exceeding the sum of 3000*l.*, with lawful interest, which should or might at any time or times thereafter be advanced and lent by the plaintiffs to *Coburn*, or paid to his use by his order and direction. The plaintiffs then suggested, under the statute, the following breaches, viz. That at divers times after the making of the condition, and before the issuing the writ, they did advance and lend to *Coburn*, and did pay to his use, divers sums of money, amounting, for money lent and advanced, and for money paid to his use respectively, to the sum of 2500*l.*, and that the interest upon and in respect of such sum amounted to the sum of 250*l.*, but that the defendants had not, nor had either of them paid the same to the plaintiffs. Whereupon a writ of inquiry was awarded, and came on at the last *Lent* assizes for the county of *Oxford*, when a verdict was taken for 2288*l.* 5*s.* 1*d.*, and interest to the date of the final judgment, subject to the opinion of the Court on the following case:

The case stated the condition of the bond as above, and that the plaintiffs, at the trial, put in an account with *Coburn*, the items of which, with their respective dates, were admitted by the Duke to be correct, and which account was an account current of monies paid and received by them to the credit of *Coburn* from the 1st of *February* 1811 to the 15th of *February* 1813. Some of the payments on the credit side were made to them

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specifically on account of the bond. The only question between the parties was the amount of the balance due from the Duke to the plaintiffs on the above account. The plaintiffs claimed a balance of 2288*l.* 5*s.* 1*d.*, with interest to the date of the final judgment, contending, 1*st*, that the object of the bond was to secure such balance as might be due from *Coburn* to them, not exceeding 3000*l.*; and, 2*dly*, supposing the bond not to extend to any sums advanced to *Coburn* after the first 3000*l.* immediately following the execution of the bond, yet that they (the plaintiffs) were at liberty to apply all payments made on *Coburn*'s account, and not specifically appropriated, in liquidation of the debt due to them from *Coburn* prior to the execution of the bond, and also of any debt which might be due from *Coburn* to them independently of the bond.

On the other hand, the Duke insisted, 1*st*, that the condition of the bond did not extend to any sum advanced by the plaintiffs to *Coburn* before the execution of the bond; 2*dly*, that the bond was a security only for the first sums advanced to the extent of 3000*l.*, and not a continuing guarantee after money to the extent of 3000*l.* had been once advanced; 3*dly*, that however the matter might be as between the plaintiffs and *Coburn*, yet as between the plaintiffs and the Duke, the latter had a right to have the sums of money paid by *Coburn* to the plaintiffs after the execution of the bond applied in his (the Duke's) exoneration to the liquidation of the advances made on the bond, and that the plaintiffs could not, as against him, apply such sums of money to the payment of any debt antecedently due from *Coburn*. Upon these principles the balance due from the Duke would be 1310*l.* 11*s.* 6*d.*,  
taking

taking up the account of the plaintiffs from the date of the bond, and making a stop therein at the time when the first 3000*l.* were advanced, and applying all the sums received by the plaintiffs since the execution of the bond to the satisfaction of the bond. The question for the opinion of the Court is, what balance, under the circumstances, the plaintiffs are entitled to recover.

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*Bosanquet*, in support of the first point made for the plaintiff, contended that the Court would look to the intention of the parties, in order to put a construction on the condition, and he cited *Metcalf v. Bruin* (a), to shew that the apparent intention is to be regarded; and therefore, in that case, a bond conditioned for the service of a clerk to the *Globe* Insurance Company was held good, though the Company was not incorporated at the date of the bond. He said that here the intention was to benefit *Coburn* in his trade, by the advance of a sum not exceeding 3000*l.*, to which extent the defendant was to remain liable on the bond, without reference to the time when or the manner in which the advances were made, the only restriction being the amount. On the second point he relied on *Goddard v. Cox* (b), and *Bloss v. Cutting*, there cited; and in *Hutchinson v. Bell* (c). *Mansfield* C. J. said "Where a person pays money, not specifying on what account it is paid, it is in the power of the person who receives it to apply it to whatever account he pleases;" and the same doctrine is laid down in *Dawson v. Remnant* (d).

(a) 12 *Bos.* 400.(c) 1 *Tenn.* 564.(b) 2 *Str.* 1194.(d) 6 *Esp. N. P. C.* 16.

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*W. E. Taunton*, contra, admitted the rule that where money is paid generally on account the receiver has a right to appropriate it; but he urged that here the rule did not apply, because the defendant, being merely a surety for *Coburn*, should have been apprized by the plaintiffs at the time when he executed the bond, that there were debts then outstanding against *Coburn*; otherwise in the absence of such notice he had a right to presume that the account was then clear between them: therefore the plaintiffs, not having given any notice, shall not be at liberty to appropriate the payments towards the liquidation of any debts which subsisted before the execution of the bond. And he cited *Newmarch v. Clay* (a) as an instance where the rule now contended for was held not to apply. And if it should be held otherwise in this case, he said that the defendant would be liable for advances made before the date of the bond, though the condition only went to future advances, which would be manifestly against the intention of the parties.

LORD ELLENBOROUGH C. J. Both sides contend for too much. This is a bond given by the surety as an indemnity for advances to a definite amount; it is the same as if the surety had expressed that the bankers might lend to the amount of 3000*l.*; and when an advance was made to that amount the guarantie became *functus officio*, and was not a continuing guarantie. On the other point, the defendant should have inquired at the time when he executed the bond whether the account stood clear: it is not a matter for presumption.

(a) 14 *East*, 239.

The Court determined that the balance which the plaintiffs were entitled to recover was 187*ol.* 2*s.* 1*d.*, with interest.

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BOVILL and Another *against* JOHN WOOD the Elder, and JOHN WOOD the Younger. (a)

Saturday,  
Nov. 6th.

**A**SSUMPSIT on an attorney's bill. Plea, that the promises were made jointly with one *Thomas Dodgson*, who is still living. Replication, that *Thomas Dodgson* had, before the commencement of the action; become bankrupt, and obtained his certificate. Demurrer. Joinder.

Joint contractors must be all sued, although one has become bankrupt and obtained his certificate; and if not sued, the others may plead in abatement.

*Scarlett* argued, in support of the demurrer, that as all the contracting parties were equally liable upon their contract in the first instance, they should all have been joined, notwithstanding the bankruptcy of one of them; and he said that no case had decided that because one of several joint contractors had obtained his certificate a plaintiff was at liberty to omit him and sue the rest. The certificate may indeed furnish the party who has obtained it with a good defence, if he choose to insist on it; but it does not therefore follow that the plaintiff may proceed against the others separately in the first instance, without ascertaining whether he will or will not avail himself of it, which is uncertain at the time of action brought. He then cited *Sheppard v. Baillie* (b), and 48 *Edw.* III. fo. 16. b., where to a writ of formedon the tenant pleaded joint-tenancy with one

(a) This case was argued at *Serjeants'-Inn*.

(b) 6 *T. R.* 327.

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 BOVILL  
 against  
 WOOD.

*Aleyn*; the demandant replied that *Aleyn* was his villain, and on demurrer the replication was holden ill.

*Abbott*, contra, maintained that the effect of the certificate was to discharge the individual, leaving the other joint contractors with him liable; the plaintiffs, therefore, ought to be permitted to bring their action against those who alone were liable; otherwise this consequence would necessarily follow, that they must sue all with a certainty of incurring the expences of a nolle prosequi as to one. If they had declared according to the fact, that the two defendants with *Dodgson*, who had since become bankrupt and obtained his certificate, undertook and promised, they would have given the answer to their own declaration; and for the same reason the defendants' plea is bad; because every plea in abatement ought to give the plaintiff a better writ, without which it cannot be sustained; but this plea only alleges that the plaintiffs ought to have joined *Dodgson*, and the replication shews that the law has discharged *Dodgson*. If he had been arrested for this debt, the Court would have discharged him upon motion. Neither can it be said that he ought to be joined because the other partners may have contribution against him, for the law will discharge him also from contribution; and there is no doubt, because it is admitted by the pleadings, that the certificate is bonâ fide, and therefore cannot now be controverted; if that had been intended, it was matter of pleading.

LORD ELLENBOROUGH C. J. The defendants have a right to require that their co-debtor should be joined with them, and the plaintiffs cannot so shape their case

as to strip them of that right, or of the benefit, whatever that may be, of having his discharge stated on the record. The plaintiffs are not at liberty to anticipate in the first instance what may ultimately perhaps be a discharge. The practice has ever been to join all the contracting parties on the record, and there is this advantage attending the practice; that it gives the party who is joined notice at the time, and also enables him at any future time to plead judgment recovered on the joint debt without the help of any averment; and it likewise advances the other defendants one step in the proof necessary in an action by them for contribution. Where a practice has existed, it is convenient to adhere to it because it is the practice, even though no reason can be assigned for it; but here it appears to be beneficial; and if any possible advantage can be stated, we ought more especially to uphold the ancient practice.

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 BOVILL  
*against*  
 WOOD.

LE BLANC J. There is no instance of such a practice as this. Where one of several joint contractors dies, the party suing always declares on a contract with the deceased and the survivors, and not with the survivors alone: here, from this mode of declaring, an objection is raised that the party has declared on a separate contract, and admitted a joint one.

BAYLEY J. There is no doubt but that the action ought to be brought against *Dodgson* jointly with the other defendants; he was not discharged absolutely, but only in such way as the legislature has prescribed; and he was not bound to take the benefit of it, quivis renunciare potest juri pro se introducto. Here a  
 material



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Bovill  
against  
Wood.

material inconvenience might result from omitting *Dodgson* in this suit, for an action might be brought by the other defendants for contribution; I do not say whether maintainable or not, but if it were brought it would throw on them a difficulty which they would not have, if *Dodgson* had been put to plead his bankruptcy in this suit, for then he would admit that he was a joint contractor, and the other defendants would have nothing to do but produce the record; but if he be not joined that will not appear unless it be proved by other means. It is said that no action for contribution can be maintained; but the other partners have a right to litigate the validity of the certificate.

DAMPIER J. I do not recollect that a declaration in this form has ever been upheld in a case like the present. The ruling case on this subject is *Noke v. Ingham* (a).

Judgment for the Defendants.

(a) 1 *Wils. R.* 89.

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MELLISH and Another *against* ANDREWS. (a)Saturday,  
Nov. 6th.

**A**SSUMPSIT on a policy of assurance on goods particularly described in the memorandum, to be thereafter valued, “ at and from *London to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders or any other purpose,*” with leave to carry, use, and exchange simulated papers, &c. warranted free from capture and seizure in the ship's port or ports of discharge, and it should be lawful to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, and to load and unload goods particularly in *Sweden*, without being deemed a deviation, at a premium of 12 guineas per cent. Loss by seizure, capture, and detention by persons unknown. At the trial before Lord *Ellenborough* C.J., at the *London* sittings in last *Easter* term, a special verdict was found, which stated in substance that the insurance was on certain specified quantities of coffee and indigo; that the ship with the coffee and indigo on board, in *August* 1810, sailed from *London* upon the voyage insured; and on the 30th of *October* arrived off *Carlshamn* in *Sweden*, and that the ship went to the port of *Carlshamn* to obtain orders and directions from the agents of the person interested in the coffee and indigo, as to her farther course and progress in the voyage; that on the 1st of *November* the captain received orders from the agents to proceed in the farther prosecution of the voyage to *Swinemunde*,

Policy of assurance on goods at and from *London* to the ship's discharging port or ports in the *Baltic*, with liberty to touch at any port or ports for orders or any other purpose, and to touch and stay at any ports or places whatsoever and wheresoever: Held that the ship having touched at *C.* for orders and gone on to *S.*, a more distant port for farther orders, and having received orders at *S.*, because it was unsafe to land there to return to *C.*, and wait for orders, might so return to *C.* without being guilty of a deviation; it being found that she went to *S.* for orders in the prosecution of her voyage, and returned to *C.* to obtain orders as to the farther progress of the voyage, and no fraud being found.

(a) This case was argued at *Serjeants'-Inn*.

which

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which was a port belonging to *Prussia*, situated higher up in the *Baltic* than *Carlshamn*, and there to receive such orders and directions as to her farther course and progress in the voyage as the agent of the person interested in the coffee and indigo should give to the captain: that the ship, on the same day did, in pursuance of such orders, set sail from *Carlshamn* in the farther prosecution of the voyage insured, and on the 8th of *November* arrived off *Swinemunde*, and waited at a distance from that port for orders and directions from the agent as to her further course and progress in the voyage; and that on the 10th of *November*, at *Swinemunde*, the captain received orders from the agent, because it was unsafe to effect any landing there, to return directly to *Carlshamn*, and there again to wait for orders from the agents as to the farther course and progress of the ship in the voyage; and that the ship with the coffee and indigo on board did, on that day, in pursuance of those orders, set sail from *Swinemunde*, and on the 15th arrived off *Carlshamn*; and that the captain returned to *Carlshamn* to obtain orders and directions from the agents, as to the farther progress of the ship in the voyage, not having at that time any specific port of discharge for the coffee and indigo in view, but meaning to abide such farther orders and directions at *Carlshamn* as he should there receive from the agents as to such port of discharge; and that on her arrival at *Carlshamn* the ship having sustained considerable damage in the course of her voyage, and being then greatly in want of repair, was through the violence of the wind and weather, and for her safety and preservation and that of the cargo, obliged to go into port there, and to procure such repairs

pairs as were then wanted; and that afterwards, on the 6th of *December*, before the ship could procure such repairs as were necessary, and while she was lying in the port of *Carlshamn* for repairs, her papers were seized and carried away by order of the persons exercising the powers of government in the port of *Carlshamn*, and she was thereby prevented from pursuing her voyage; and that afterwards, on the 1st of *May* 1811, while the ship's papers were so detained, the coffee and indigo were by force and violence seized, carried away, and confiscated by the persons exercising the powers of government in the port of *Carlshamn*, and thereby the coffee and indigo became and were wholly lost to the proprietor thereof.

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*Puller*, for the plaintiffs, stated the question intended to be raised by the defendant on this special verdict to be, whether on the construction of this policy, it being found by the jury that the assured were in the bonâ fide prosecution of the voyage, they were at liberty to go back to *Carlshamn* a second time for orders? He contended that they were; that they might retrace their steps and seek a port in an inverse order; and for that he referred to the terms of the policy, which he said were as large as possible to indicate an intention of leaving to the assured a discretion to act according as circumstances should require. The policy specifies no port of destination, it is only to the ship's discharging port; and this is accounted for by the state of the *Baltic* trade at that time, which rendered it impossible to ascertain beforehand a port of safety. The language therefore of the policy was adapted to the shifting condition of the *Baltic* commerce, and did not limit  
 the

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the assured to any particular port. And as they had an ultimate port to seek, they had also liberty "to touch at any ports for orders or any other purpose" without restriction as to the particular course or order of touching at such ports. This indeed is denied by the defendant, and upon this the question turns; it is admitted that the assured might seek a port of discharge any where within the *Baltic*, but it is denied that they were at liberty to touch at ports in any other than a progressive order, and that having once touched at a port they could return thither. But it is obvious that such restriction might defeat the whole object for which the liberty was given, and indeed the voyage itself; for, suppose the ship in the first instance had gone to the most distant port in the *Baltic* for orders, and been frustrated in her expectations there; according to the argument of the defendant the liberty would be extinct, because every port at which she could afterwards touch for orders would lie in a retrograde course; and if she could not touch for orders neither is it possible to conceive how she could ever reach a port of discharge. It therefore seems an answer to such an argument to say that the policy contains no such express restriction, and that to imply one would be contrary to the apparent intention of the parties. As to the cases of *Beatson v. Haworth* (a), and *Clason v. Simmonds* (b), where the Court restrained the assured to a particular course; in both those cases the voyage intended and the terminus ad quem were described in the policy; and it was observed as a ground of decision in the former case, that the parties, by inserting

(a) 6 T.R. 531.

(b) Cited by *Lawrence J.* 6 T.R. 533.

the names of the places contrary to the natural order in which they lay in the ship's course, shewed it to be their intention to vary the natural course of the voyage. That this liberty must be interpreted as subordinate to the voyage insured is no argument against a construction which is founded on what the parties insuring the voyage must have intended; and there is no danger lest the voyage should be protracted to an unreasonable length by means of this unlimited liberty, because it will always be for the jury to say whether the voyage has been prosecuted *bonâ fide*; and here they have found that it was, i. e. that although there was not any terminus fixed by the policy, the ship was in her progress towards seeking her port of discharge.

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*Taddy contra*, maintained that the ship having once touched at *Carlshamn* for orders could not, under the circumstances, return thither for orders. The verdict does not find that the return from *Swinemunde* to *Carlshamn* was in the prosecution of the voyage, nor that there was any necessity for so returning: and in cases where a liberty to the extent now claimed has been intended, it has been usual to express it on the face of the policy. Thus in *Rucker v. Allnutt* (a), to a liberty nearly the same as the present, there was added *with leave to return* to any ports or places; and the same thing is frequently expressed by the words *backwards and forwards*. And therefore what has been said upon the terms of this policy being as large as possible, appears not to be well founded; it is true indeed that it is to the ship's ports of discharge, in general terms, which therefore gave the assured a right to make his election

(a) 15 East, 278.

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at a subsequent time; but *Clason v. Simmonds* determined that those words do not authorize the assured to seek a more distant port first, and then to return to one nearer. In like manner the liberty to touch at any ports does not, according to *Hogg v. Horner* (a), and *Lavabre v. Wilson* (b), give a power to change the regular course of the voyage, it only extends to ports in the usual course of the voyage. It is not necessary, however, in this case, to contend that the assured might not have gone to *Swinemunde* first, and afterwards to *Carlshamn*; all that is contended is, that having elected to go to *Carlshamn* once for orders, they cannot, without shewing some necessity, return to the same port for the same purpose. If they could, it might lead to an indefinite protraction of the voyage, and the same indefinite liability of the underwriter.

Lord ELLENBOROUGH C. J. This is an action upon a contract perfectly new in its form and object, and to which a rule of construction must be applied, not drawn from another state of things where a terminus a quo and ad quem are prescribed, and where going out of the prescribed course would certainly be a deviation. This is an adventure founded on the peculiar state of the *Baltic* commerce. It was quite uncertain at the time of the insurance where the discharging port was to be, whether that power which was then in amity would continue so up to the time of the ship's arrival. Therefore there was an indefinite liberty given, in consideration of a very high premium, to touch at any ports for orders with the view of gaining

(a) 2 *Marshall on Insurance*, 397.

(b) *Doug.* 284.

intelligence

intelligence before the perilous determination of the ship's discharge should be formed, which intelligence it might be necessary by repeated visits to acquire. There was nothing to fix any limit; the ship might go to the end of the *Baltic* first, and might afterwards, by coming back to a nearer port, find security growing up at the former port, which it had not foreseen when first there. The nature of the thing implies that the assured should be enabled to make every call which might be necessary for safety; it might turn out that at one port they might find it unsafe to discharge, and then they would be thrown back upon a former port; the voyage therefore was to continue so long as it was prosecuted without fraud. There is no circumstance of fraud found in this case, which, in order to avail, ought to be found expressly upon a special verdict, and not to be left as a matter of inference. The ship called at *Carlshamn* and there received orders to go to *Swinemunde* for farther orders, and probably it was contemplated that they would there receive orders to land; instead of which they found the place so circumstanced that it was unsafe to land there; but whilst she was lying off the captain was directed by an agent to return to *Carlshamn* as being a place of greater security. What is there in this policy that makes the calling but once a condition? The whole mistake seems to arise from supposing that there was some geographical order of voyage described in the policy, whereas it was a mere seeking voyage: or perhaps the introduction of the words backwards and forwards into some other policies, which was perhaps unnecessary, has given rise to this case, and because those words were inserted in other cases *ex majori captelâ* and are not to be found here,

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therefore it is said that we are to hold a different construction. But when a voyage all over the *Baltic* is stated to be the adventure, can it be necessary to state more? The object of the adventure was that the assured should call as often as necessity required, and there is nothing in the nature of the thing that makes the calling again absurd or contrary to what may be presumed to be the intention of the parties. Here the special verdict finds that what was done was all done in the course and progress of the voyage, or to obtain orders as to the farther progress of the voyage; and we must therefore presume that the ship fairly went for orders, first to *Carlshamn* and then to *Swinemunde*, and then back to *Carlshamn*. On the facts as they are now found, it seems to me that the assured might call a second time for orders, and therefore there is nothing to defeat their right to recover.

LE BLANC J. The question is whether the ship was not under the protection of the policy in her return back to *Carlshamn*. The contract of the parties must depend on the terms of the policy, which do not point out any definite port of discharge. The policy is, "at and from *London* to the ship's discharging port" generally, "with liberty to touch at any ports for orders or any other purpose." That is as large as possible. What reason or authority is there which says that where a particular port of discharge is not fixed, and where there is a liberty to touch at any ports for orders, there having once touched at a port and having been told to go back to that port, the assured must go on elsewhere to another port, where, if it be hostile, the inevitable consequence would be that the ship  
 must

must be lost? The argument is, that the ship should have disobeyed the orders at *Swinemunde*, and not have gone back. If she had done so she would not then have been under any orders to go to her port of discharge. I think therefore that the ship was under the protection of the policy in the same manner as if the words backwards and forwards or sideways had been introduced.

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BAYLEY J. I am of the same opinion. I think the ship might return to *Carlshamn* a second time for farther orders. There is nothing in the terms of this policy or in the nature of the case which prevented it. As the facts are stated I do not see what else she could do. She had not any option except to go back to *Carlshamn* or else to go on without any orders. As no *mala fides* is stated, we are bound to consider that she acted *bonâ fide*. And there is no inconvenience likely to result from this decision, because a ship will not wantonly go a second time to a port for orders, it being her interest to get a discharging port as soon as possible.

*Per Curiam,*

Judgment for the plaintiff. (a)

(a) See *Mellish v. Andrews*, 16 *Emt.* 312.

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Saturday,  
Nov. 6th.

KENSINGTON, Assignee of THOMAS CHANTLER,  
a Bankrupt, against T. CHANTLER the  
Younger. (a)

Money given by a father, who is a trader, to his son, to advance him in a partnership trading concern, is not within 1 Jac. 1. c. 15. s. 5., and cannot be recovered from the son by the assignees of the father, who afterwards becomes bankrupt. The undertaking of the plaintiff upon the usual rule for bringing back the venue to *Middlesex*, is satisfied by the production of the commission of bankruptcy tested at *Westminster*.

**A**SSUMPSIT for money had and received to the use of the bankrupt before his bankruptcy, and for money had and received to the use of the plaintiff. Plea, general issue. At the trial before Lord *Ellenborough* C. J. at the *Middlesex* sittings after last *Michaelmas* term, a verdict was found for the plaintiff for 800*l.*, subject to the opinion of the Court on the following case:

*Thomas Chantler*, the bankrupt, was in and before *May* 1809 a trader as banker and money-scrivener, and was duly declared a bankrupt on the 12th of *April* 1810, and on the 10th of *May* the commissioners executed an assignment of his estate and effects to the plaintiff, and on the 7th of *April* 1812 they executed a special assignment to the plaintiff of the monies sought to be recovered by him in this action. The defendant was examined on his oath before the commissioners under the commission, on the 6th of *June* 1810; and in his examination, signed by him, deposed (amongst other things) as follows: that about a month before attaining the age of twenty-one his father gave him two flatts or boats which had been in his possession ever since, and also several sums of money, of which he had not kept any account; that he attained the age of twenty-one on the 30th of *May* 1808; that about *May* 1809 he embarked in a salt-work with Messrs.

(a) This case was argued at *Berjants's Inn*.

*Lawton*

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 KENSINGTON  
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 CHANTLER.

*Lawton* and others, and his father then agreed to give him 2000*l.* to embark in the concern, but paid and advanced about 400*l.* only, he could not say exactly; that the advance of all the parties was 300*l.* a piece; that he (the defendant) kept the books, but could not say to what amount he had advanced, but thought he had advanced more than the other partners. Not less than 800*l.* or more than 1000*l.*, perhaps 900*l.* had been advanced on account of the said salt-works by his father. He had no accounts or minutes. Several sums were advanced; the first advance was made directly after *May* 1809, but he did not recollect the sum; the last advance was made about *October* or *November*. The difference between the 300*l.* or 400*l.* and the 1000*l.* was in his possession, except what he had spent; the horses might have been paid out of this money, and he had about 400*l.* by him. He was entrusted with his father's cash occasionally, and had taken sums therefrom without mentioning the sum at the time, which were all included in the 1000*l.* before-mentioned to have been received on account of the 2000*l.* promised to him by his father. The flats cost about 780*l.*, and were paid for by the father. It was agreed at the trial that this deposition contained the real facts of the case, and that it should be used on the argument of this case by either party. In this case the venue having been changed into *Cheshire* was brought back into *Middlesex* by the usual rule, and the only evidence arising in *Middlesex* was the production of the commission of bankruptcy, tested at Westminster the 12th day of *April* 1810; upon which an objection was made by the defendant's counsel that the plaintiff ought to be nonsuited, and the point was reserved by his Lordship.

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KENSINGTON  
against  
CHANTLER.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover; if the Court shall be of that opinion the verdict is to stand; if not, a nonsuit is to be entered.

*Burrough*, for the plaintiff, having received an intimation from Lord *Ellenborough* C. J. that his Lordship and the other Judges were of opinion the proof was sufficient to satisfy the plaintiff's undertaking to give material evidence in *Middlesex* (a), addressed himself to the other point, which he said was this, whether a voluntary gift of money by a father, who is a trader, to his son, not upon the marriage of his son, was within the statute 1 Jac. 1. c. 15. s. 5. And he contended that it was; and cited *ex parte Shorland* (b), where the Lord Chancellor seemed to think that a gift of money might be brought within the statute, though it was not so in that case; and according to *Nicholas J.* in *Tucker v. Cosh* (c), the statute ought to receive a large construction, because it was made for the good of the commonwealth: but Lord *Ellenborough* C. J. observed that the statute had not the word money, and seemed to be confined to things which were the subject of conveyance, and capable of being conveyed or procured to be conveyed (d); and that the doctrine contended for would go the length of making a son liable to refund every portion of money given to him by his father for his maintenance.

*Per Curiam*,

Nonsuit to be entered.

(a) See *Watkins v. Towers*, 2 T.R. 275. *Cameron v. Gray*, 6 T.R. 363. *Clarke v. Reed*, 1 N.R. 310.

(b) 7 Ves. 88.

(c) *Styles*, 289.

(d) See *Walker v. Burrows*, 1 Aik. 93. *Lilly v. Osborn*, 3 P. Will. 298. *Fryer v. Flood*, 1 Bro. Ch. C. 160. *Glaister v. Hewer*, 8 Ves. 195.

1813.

MARTIN *against* BRECKNELL. (u)Saturday,  
Nov. 6th.

DEBT on bond dated the 25th of *March* 1809, for 1800*l.* The defendant craves oyer of the bond and condition, which is a joint and several bond by one *Gardiner* and the defendant, conditioned for the payment by *Gardiner* to the plaintiff, of 9000*l.*, with interest half-yearly at 5 per cent., at the times and in manner following, (that is to say,) 600*l.* on the 25th of *March* 1810, and the like sums on the same day, in the six successive years following, the sum of 1000*l.* on the 25th of *March* 1817, and the like sums on the same day in the three successive years following, and 800*l.* being the residue of the said 9000*l.*, on the 25th of *March* 1821, together with all interest and arrears of interest that might be then due, &c.: the defendant pleads payment of the 1st and 2d instalments with interest by *Gardiner*, and of the 3d by himself, (on which no question arose); and as to the 4th instalment, that on the 20th of *February* 1813 *Gardiner* became a bankrupt, and that afterwards and before the 25th of *March* 1813 the plaintiff received, from the estate of *Gardiner* as and for a dividend upon so much of the said principal money as still remained due to the plaintiff upon the bond and condition the said 4th instalment, or sum of 600*l.*, together with all interest then due. And so he concludes that the bond and condition hath been in all things well and truly performed by payment of the said several instalments so due. The plaintiff replies, and denies the receipt modo

The obligee of a bond given by principal and surety conditioned for the payment of money by instalments, who has proved under a commission of bankruptcy against the principal the whole debt, and received a dividend thereon of 2*s.* and 7*d.* in the pound, may recover against the surety an instalment due, making a deduction of 2*s.* and 7*d.* on the amount of such instalment, and the surety is not intitled to have the whole dividend applied in discharge of that instalment, but only rateably in part payment of each instalment as it becomes due.

(u) This case was argued at *Serjeants'-Inn*.

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MARTIN  
against  
BRECKNELL.

et formâ; on which issue is joined. At the trial before Lord *Ellenborough* C. J., at the *Middlesex* sittings after last *Easter* term, the jury found a verdict for the plaintiff, and assessed damages at 780*l.*, subject to the opinion of the Court on the following case :

The three first instalments, together with all interest due on the bond up to the 25th of *September* 1812, were duly paid as stated in the plea. On the 13th of *June* 1812 *Gardiner* became a bankrupt, and the plaintiff, on the 13th of *February* 1813, proved under his commission the sum of 7200*l.*, being the principal money then remaining due on the bond, and on the same day received from the assignees of *Gardiner* a dividend of 2*s.* 7½*d.* in the pound on his debt of 7200*l.*, amounting to 945*l.* No interest was proved or paid under the commission. The fourth instalment, amounting to 600*l.*, and interest on the sum of 7200*l.* from the 25th of *September* 1812 to the 25th of *March* 1813, amounting to 180*l.*, still remain unpaid, except so far as the Court may consider the same, or any part thereof, to have been satisfied by the dividend of 945*l.* so received by the plaintiff under the commission.

The question for the opinion of the Court is, whether the 4th instalment, and the interest on 7200*l.* from the 25th of *September* 1812 to the 25th of *March*

1813, are satisfied in whole or in part by the dividend. If the Court shall be of opinion that the same are not satisfied, then the verdict is to stand for 780*l.* found by the jury, or for such other sum as the Court shall think the plaintiff entitled to recover : but if the Court shall be of opinion that the same are satisfied, then a nonsuit to be entered.

*Richardson,*

*Richardson*, for the plaintiff, admitted that he could not retain the verdict for the whole sum found by the jury, but insisted that he was entitled to that sum, making a deduction of 2s. 7d. in the pound upon the amount of the 4th instalment, and a rebate for interest from the 13th of *February*, when the dividend was received, to the 25th of *March*, when the instalment became due. In cases of bankruptcy the fund is to be distributed in liquidation of each pound due to each creditor; and if there be not sufficient to liquidate the whole, then proportionally in part payment of each pound.

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 MARTIN  
 against  
 BRECKENELL.

*Puller*, contra, was here called on by the Court, and he said that the only question was, how far the obligee, who had received 945*l.* on account of this bond, was at liberty as against a surety to withhold any part of it from being applied in discharge of the instalment due, and to apply it only rateably to that instalment. And he contended that the whole ought to go in discharge of the instalment; and took a distinction between money paid by the act of the party and money paid by act of law: in the one case the party paying may appropriate it as he pleases; and therefore if *Gardiner*, while he continued solvent, had paid the 945*l.* expressly on account of each instalment as it became due, that would have been different; but where the money is paid by act of law, the law will appropriate it; and in this case it will appropriate it in favour of the surety, because the proving under the commission was for the benefit of the surety. And this will not prejudice the plaintiff in the result, for if the dividend is applied in discharge of the instalment now due, it will relieve



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MARTIN  
against  
BRICKNELL.

relieve the future instalments from this charge, and the plaintiff will still be entitled to look to the surety upon his bond for all but 945 $\frac{1}{2}$ l., which he has received. He said that he was not able to find any case upon the point.

LORD ELLENBOROUGH C. J. There might perhaps have been a case where it was held that a payment under a commission of bankruptcy should enure entirely to the benefit of the surety; but if there be not any such case, then it must be taken according to the nature and reason of the thing; that is, as each instalment becomes due, 2s. 7 $\frac{1}{2}$ d. in the pound is to be deducted out of it. It might make a material difference to the plaintiff whether he is to recover on the instalment now due, or to wait for a future instalment; for before that grows due the surety might become insolvent.

BAYLEY J. The surety is benefited by this dividend; for he has a right to deduct 2s. 7 $\frac{1}{2}$ d. in the pound out of each instalment.

*The Court* directed the verdict to stand for the sum found, deducting 2s. 7 $\frac{1}{2}$ d. in the pound on 600l., with a rebate of interest from the 15th of *February* to the 25th of *March*.

1813.

## PALMER and Another against Moxon (a).

Saturday,  
Nov. 6th.

**ACTION** against the defendant, (late sheriff of the town and county of *Kingston-upon-Hull*) for a false return to a writ of testatum *fi. fa.* Plea, general issue. At the trial before *Thomson B.* at the last spring assizes for the county of *York*, a verdict was found for the plaintiffs for 22*l.* 17*s.*, subject to the opinion of the Court on the following case:

In *Easter* term 1812 judgment was recovered in this court by the plaintiffs against one *John Moody* for 237*l.* damages and costs, upon which a writ of testatum *fi. fa.* issued, directed to the sheriff of the town and county of the town of *Kingston-upon-Hull*, indorsed to levy 238*l.* 1*s.* 4*d.* besides poundage, &c. The writ was delivered to the defendant, then sheriff, &c. on the 11th of *June* 1812, at a quarter past 12 o'clock in the afternoon, and a warrant was granted thereon by the sheriff directed to his officer, under which writ and warrant the officer, about half past 3 o'clock of the same afternoon, took possession of one 4th part of the brig *Thirsk*, then lying in the port of *Hull*, being the port to which the brig belonged, and in which she was registered; and her port of registry was not altered in consequence of the sale or transfer hereinafter mentioned. On the 10th of *June* 1812, *J. Moody* being owner of one 4th, *Richard Duckles* of another 4th, and *Matthias Moody* and *Tho-*

A bill of sale of 3-4th parts of a ship, then being in the port to which she belongs, executed by three of four joint-owners, transfers the property to the vendee at the time of its execution, if at that time a memorandum of such transfer be indorsed on the certificate of registry; and signed by the three, and a copy of such indorsement be delivered to the proper officer on the next day, and afterwards within a reasonable time the other owner execute the bill of sale and sign the indorsement and a copy of the indorsement signed by the four, be left with the proper officer; therefore, where upon a writ of *fi. fa.* against one of the three the sheriff seized his share after the execu-

tion of the bill of sale and signature of the indorsement by the three, but before the delivery of the copy of such indorsement to the proper officer: held that the sheriff might abandon the seizure and return *nulla bona*.

(a) This case was argued at *Serjeants'-Inn*.

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*mas Duckles* of another 4th part of the said brig, by a bill of sale of that date, in consideration of the sum of 910*l.* paid to them in the respective proportions in which they were entitled, the receipt of which they acknowledged, fully and absolutely granted, bargained, sold, assigned, and set over to *T. Bradbury, T. Stevenson, and J. Aaron*, their executors, administrators, and assigns, three full, equal, and undivided 4th parts or shares, (the whole into four equal parts or shares being considered as divided) of and in the said brig, together with three full, equal, and undivided 4th parts or shares of and in all and singular the masts, &c. to the said brig belonging, which said brig was stated to have been duly registered pursuant to the act of parliament, and a copy of the certificate of such registry was set forth in the bill of sale, in which certificate *J. Moody* is stated to have sworn that he was the sole owner of the brig: To have and to hold the said three undivided 4th parts or shares of and in the said brig, and all other the bargained premises, unto the said *Bradbury, Stevenson, and Aaron*, to the uses following; that is to say, as to one undivided 4th part to the use of *Bradbury*, his executors, administrators, and assigns; as to one other undivided 4th part, to the use of *Stevenson*, his executors, administrators, and assigns; and as to the remaining undivided 4th part, to the use of *Aaron*, his executors, administrators, and assigns." The bill of sale was executed on the day of its date by *J. and M. Moody* and *T. Duckles* at or about 5 o'clock in the afternoon, and at the same time a memorandum of the said transfer by all the four was indorsed on the certificate of registry, and was signed by the three; but neither the bill of sale nor the memorandum of transfer was signed or executed

by *R. Duckles* until the 15th of *June* following. The hour for transacting business at the custom-house in *Hull* was from nine in the forenoon until two in the afternoon. On the 11th of *June* at a quarter before two in the afternoon, a true copy of the memorandum so indorsed on the certificate of registry, and signed by the three as aforesaid, was left with the proper officer of the custom-house in *Hull* to be entered; and on the 15th of *June* another copy of the memorandum with the signatures of the four was also left with the proper officer at the said custom-house for the same purpose. Neither the defendant nor his officer made sale of the said 4th part seized by them under the writ and warrant, nor did they retain the possession, but abandoned it; and afterwards the defendant returned nulla bona, except as to the sum of 16*l.* 3*s.* arising from the sale of one 64th part of another vessel belonging to *J. Moody*. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover; if the Court are of opinion that they are so entitled, the verdict is to stand; otherwise a nonsuit is to be entered.

*E. Alderson*, for the plaintiffs, stated the question to be whether the title of the plaintiffs to one 4th of the said property of *J. Moody*, which vested in them by the delivery of the writ of *fi. fa.* to the sheriff on the 11th of *June* at a quarter past twelve, was to be preferred to the title of *Bradbury, Stevenson and Dixon*, derived to them under the bill of sale of the 10th of *June*. And he said that that would depend upon another question, whether upon the true construction of 34 *G. 3. c. 68. s. 15.* the bill of sale was void and inoperative, as against the plaintiffs, until all the requisites

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requisites of that section were complied with; or whether the property passed immediately by the bill of sale defeasible only in the event of not complying with those requisites within a reasonable time. The section enacts "that upon any alteration of property in any ship &c., the indorsement upon the certificate of registry shall be made in the form there expressed, and shall be signed by the persons transferring the property by sale, contract, or agreement for sale, or some person authorized by them, and *a copy of such indorsement shall be delivered to the person authorized to make registry, otherwise such sale, contract, or agreement shall be utterly null and void to all intents and purposes whatsoever.*" These requisites with the exception of the delivery of a copy of the indorsement to the proper officer, were complied with at the time of sale, and before the plaintiff's title accrued; so that the question is reduced to this, whether by the bill of sale and indorsement any title passed to the vendees before the delivery of the copy of such indorsement; or at the utmost more than an inchoate title, which was defeated by the intervention of the plaintiffs' title before its perfection. In *Moss v. Charnock (a)*, the same question arose on the 16th section of this statute, which in certain cases directs a copy of the bill of sale to be delivered by the vendee to the registering officer without limiting any time for such delivery; and it was resolved that the statute was to be construed as enacting that no bill of sale shall have any operation or effect, until the requisites imposed on the parties to the sale shall have been complied with; and therefore in that case, although the sale was perfected

(a) 2 East, 399.

within 10 days after the ship's return, yet the bankruptcy of the vendor having intervened between the time of executing the bill of sale and complying with those requisites, it was adjudged that the property did not pass by the bill of sale, but was in the assignees, and that no relation should be allowed to hold good, so as to make the conveyance effectual from any antecedent time. And *Lawrence J.* added (a), "that the public would be best served by holding that no interest should pass until the public has that information which is so essential to its commercial welfare: and that he was not aware of any authority to shew that if a statute direct certain things to be done to give effect to an instrument, without limiting a time for doing it, such statute is to be construed as if it had said that it shall be sufficient if the thing be done within a reasonable time." It may be said indeed, that the Lord Chancellor has since expressed his doubts in *Mestaer v. Gillespie* (b) as to the generality of these propositions; but they are not without analogy to support them. Thus by the several bankrupt acts, 13 *Eliz. c. 7.* 1 *Jac. 1. c. 15.* and 21 *Jac. 1. c. 19.* the assignees are required to make sale by deed inrolled; which has been construed to mean that the property shall not pass by assignment until enrolment made; and in *Perry v. Bowes* (c) the Court said, it would be very inconvenient to admit of relation, because there is not any time prefixed for the enrolment. Again it may be said, that *Wood B.* did not agree to *Moss v. Charnock*, but held a contrary opinion in *Hubbard v. Johnstone* (d), that the property passed instantly by the bill of sale, and that the subsequent acts are

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(a) 2 *East*, 430.(b) 11 *Ves.* 637.(c) 1 *Vent.* 360.(d) 3 *Taunt.* 208.

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not essential to the transfer of the property: but it is observable that he as well as the Lord Chancellor in the former case, grounds his opinion on this, that if it were otherwise there could be no transfer of the property when a ship is at sea; which seems to be an erroneous deduction from *Moss v. Charnock*; for the rule there established applies only to acts for the performance of which no time is limited though they are to be performed in regular succession; but where a time is limited, the subsequent acts if done within that time shall have relation to the original act. And that is the rule which will be found to govern the transfer of property in ships at sea. To complete such a transfer a copy of the bill of sale must certainly be delivered *instantly* because no time is limited for doing it, but the statute allows 10 days after the return of the ship for the performance of the subsequent acts, and therefore the transfer of a ship at sea may be made without danger of any intervening title provided the subsequent acts be done within 10 days of her return. And great inconvenience might ensue from holding that in all cases a compliance with the act within a reasonable time will be sufficient; because it might lead to a negligent observance of the act, and also to the prejudice of mere purchasers, who have made no default in completing their transfers; and the policy of these acts, which is to prevent foreigners from being in any wise proprietors of *British* ships, will be best consulted by making a prompt compliance with these requisitions essential.

*Littledale*, contra, insisted that the transfer was complete by the execution of the bill of sale, and that the other requisites of the statute were only in the nature of conditions

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conditions subsequent, not essential to the vesting of the title though they might defeat it, if not complied with within a reasonable time. He urged that by 7 & 8 W. 3. c. 22. a registry was all that was necessary upon the transfer of property in a ship, and until the 26 G. 3. c. 60. s. 17. which required the recital of the certificate in the bill of sale, the transfer might have been by parol; and even after that statute it was doubted whether every transfer of property in a ship was required to be made by an instrument in writing; but the 34 G. 3. c. 68. s. 14. removed those doubts by avoiding all transfers not made by bill of sale or instrument in writing containing such recital as is prescribed by the 26 G. 3. This shews that it was to the bill of sale that the legislature looked as to the efficient instrument of passing the property, and not to the other matters required to be done by s. 15. which are collateral to it. The very form of indorsement which that section prescribes, "Be it remembered that I have this day *sold and transferred*" assumes that a transfer has already taken place by the bill of sale; and in the same sense it goes on to enact "that a copy of the indorsement shall be delivered &c. otherwise such *sale* shall be void." It therefore falls precisely within the meaning of a condition subsequent, which is defined to be such as defeats an estate by some subsequent act (*a*); as if a fine be to the use of another or a feoffment &c. upon condition that if such an act be afterwards performed, the estate shall be void. So here is a sale of the ship, and if an indorsement be not made, and a copy delivered, the sale shall be void; therefore the vendee shall have the property

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(a) *Comp. Dig. Condition. C. Br. Abr. Cond pl. 67.*

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until the condition be broken. As to the hardship, it never could be intended that these vendees who it appears have paid the money, for the bill of sale acquits them of the payment, should not take any thing under it until the subsequent acts were complied with; and besides, the subsequent acts cannot be done instanter, for they are in their nature consecutive acts; a reasonable time therefore must be allowed for doing them.

Lord ELLENBOROUGH C. J. I think the case of *Moss v. Charnock* was rightly decided, though perhaps there may be some expressions found in it, as has been observed by the Lord Chancellor, which go farther than the case required or the law warranted. I confess that I have always thought the things required to be done by the act were in their nature conditions subsequent. What is required to be done within ten days must undoubtedly be done within ten days; but where no time is limited the act must be done within a reasonable time; Lord *Coke* says, where no time is limited, the law appoints the time, and he notes the diversities where a party has during his whole life, or has only a convenient time, according to the subject-matter (a). And certum est quod certum reddi potest; a reasonable time is as capable of being ascertained by evidence, and when ascertained is as fixed and certain, as if fixed by the act of parliament. In this case all that was required to be done by the parties to the transfer was done by three of them, one of the three being the person whose share is now in question; and what was done by them was done as near as may be instanter, for the copy of the indorsement was left with the

(a) *Co. Lit.* 208. b.

officer the next day after executing the bill of sale and signing the indorsement; but it appears that one of the parties did not execute until afterwards; but still when he executed, he did it within a reasonable time; and all was perfected before the return of the writ.

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LE BLANC J. In two cases since *Moss v. Charnock* viz. in *Mestaer v. Gillespie & Hubbard v. Johnstone*, the same point has again come under consideration; and the opinion of the learned persons who had occasion to advert to it in those cases was, that some expressions were to be found in *Moss v. Charnock* which gave a greater generality to the propositions there laid down, than they could accede to; yet the decision itself has not been over-ruled, but stands as an authority. The argument to-day is founded on particular expressions used in the judgment of that case. I concurred in its decision; but think that the observations of the Lord Chancellor in *Mestaer v. Gillespie*, as well as what fell from the Court in *Hubbard v. Johnstone* have put a limit to some of the terms in which the judgment was conceived in that case. I think therefore there was in this case a valid transfer by the bill of sale, the subsequent acts having been done within a reasonable time.

BATLEY J. The case of *Moss v. Charnock* was I think rightly decided under the circumstances; for there the bill of sale was executed on the 23d of *August*, and the requisites of the statute were not complied with until the 5th of *December*, so that there was gross delay. Expressions used in that case have been pressed upon us, which would certainly militate against the present

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decision; but those expressions appear upon consideration to have gone farther than what was necessary or the law warrants. The true construction of these acts seems to be this, that the bill of sale shall be holden to transfer the property from the time of its execution, but shall be liable to become void *expost facto*, that is, if the party does not comply with the requisitions of the statute within a reasonable time, upon the failure of which the statute makes the sale null and void.

DAMPIER J. I am of the same opinion. The argument has been properly put on the general expressions used by *Lawrence J.* in *Moss v. Charnock*; and if they are to be taken to the letter, they certainly would uphold the argument; but they have since been commented on and restrained in their generality, and were not necessary to be carried to the full extent for the decision of that case. The case itself was properly decided; because the requisites of the statute, considering them as conditions subsequent, were not complied with within a reasonable time. When therefore those expressions again fell under the consideration of the Court, the Judges thought that they ought to be restricted. It seems to me that these are conditions subsequent: there are no words in the act to shew that they ought to be taken as conditions precedent. The efficient act is the bill of sale which is to be void if the requisites of the statute are not complied with afterwards. That falls precisely within the definition of a condition subsequent. It must be left to the Court and jury to say whether there has been a compliance within a reasonable time, and in what manner the condition  
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has been performed. Here the requisites have been complied with within a reasonable time, and therefore it seems to me that the bill of sale is valid.

Judgment of nonsuit.

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ADLEY against REEVES (a).

Saturday,  
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**A**SSUMPSIT against the defendant as treasurer of the Company of Free Fishers and Dredgers of *Whitstable*, for money had and received by him to the use of the plaintiff. Plea, general issue. At the trial before Lord *Ellenborough* C. J. a verdict was found for the plaintiff, damages 5*l.*, and costs 4*s.*, subject to the opinion of the Court upon the following case:

There has been time out of mind an oyster fishery within the limits of the manor and royalty of *Whitstable* in *Kent*, extending a considerable distance, which has been managed and carried on by a Company of Free Dredgers, called the *Whitstable* Company of Dredgers, who have held the same from time out of mind as tenants under the lord of the manor and royalty, on payment of a certain annual rent; and the lord has also held a court, commonly called a Court of Dredging, for the ordering and regulating of the said oyster fishery, besides the court leet and court baron of the manor; at which Court of Dredging the fishermen and dredgermen have constantly attended pursuant to a notice given by the lord or his steward of the said

A bye-law made by the freemen of a company of oyster fishermen, prohibiting any freeman from being engaged in the trade of sending oysters to market from any other ground on the *Kentish* shore than the oyster-ground of the company, under a penalty of 1*ol.*, and in case of refusal to pay the same, that such freeman shall thenceforth and until the fine be paid be excluded from all share of the profits to be made thereafter by the joint trade of the company, is a void bye-law, there being no usage stated to that extent, but only an usage for the freemen

to make orders for regulating the company and fishery, with fines and penalties for the breach of such orders, and for prohibiting the freemen from being engaged in other oyster-grounds under penalties to be stopped out of the money arising by the sale of the stint of oysters of such freemen.

(a) This case was argued at *Serjeants'-Inn*.

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Court of Dredging, and out of the freemen of the said company 12 of the most sufficient men amongst the said Dredgers have used to be sworn to be of the jury of the said court, and the foreman, jury, and major part of the freemen of the company present at the court, with the consent of the lord or his steward, have used to *make orders for regulating the company, and oyster fishery, with fines and penalties for the breach of such orders, such fines and penalties being in some instances made payable to the lord of the manor and royalty for the time being, in other instances to the lord and the tenants of the fishery jointly, and in other instances to the tenants or company alone; which fines and penalties have been accustomed to be collected and levied in the manner directed by the orders. Orders or bye-laws have from time to time been made in the manner before mentioned, for prohibiting under certain penalties the freemen from holding or using any other grounds for the catching of oysters, or from being in partnership with any other tenant or tenants, occupier or occupiers of any other oyster-grounds than the oyster-grounds belonging to the manor and royalty, and also directing such fines and penalties to be stopped and detained out of the money arising by the sale of the stint of oysters of such freemen offending.* At a Court of Dredging duly held for the ordering and regulating the said company and oyster fishery on the 21d of July 1805, pursuant to notice, an order or bye-law was made by the foreman, jury, and major part of the freemen of the company present at that court, with the consent of the steward of the court, as follows: " It is ordered, that if any freeman or free-widow of this manor, royalty, company, or fishery of *Whitstable*, shall at any time or times

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hereafter, either by himself or herself, or jointly with any other person or persons, directly or indirectly be engaged or concerned in the trade or business of sending oysters to the market of Billingsgate, or to any other market or markets, place or places for sale, from any oyster-ground or oyster-grounds upon the Kentish shore, or any part thereof, other than the oyster-grounds of the said manor, royalty, and fishery of Whitstable, such freeman or free-widow so offending shall forfeit and pay as a fine for every such offence the sum of ten pounds, to be applied to the use of this company; and in case such freeman or free-widow shall refuse or neglect to pay the said fine or sum of ten pounds to the water-bailiff of the said manor and royalty within the space of 24 hours next after the same shall have been duly demanded of such freeman or free-widow by such water-bailiff, such freeman or free-widow so neglecting or refusing shall from thenceforth and until such fine be paid, be wholly excluded from all share of the profits to be made thereafter by or from the joint trade in oysters of the freemen of this manor, royalty, or fishery; and such profits shall in the mean time be divided as if such freeman or free-widow so neglecting or refusing had wholly ceased to be a freeman or free-widow of this manor, company, and fishery." The bye-law contained farther prohibitions against any freeman or free-widow permitting any apprentice to be employed in assisting to get any oysters from any other oyster-ground on the Kentish shore, and generally against their trading in oysters from any other oyster-ground on the Kentish shore; and also against their laying any oysters, or in any other manner supporting any other oyster-ground upon the Kentish shore, under the like penalty and subject to the

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same exclusion in case of neglect or refusal to pay as before mentioned.

By the 33 G. 3. c. 42. the several persons then comprizing the *Whitstable* Company of Dredgers, and their successors, were declared a body corporate, and all powers then belonging to and used by the said company for the regulation of the fishery were thereby vested in the said corporation and their successors, who were empowered to exercise the same in the same manner as they were then exercised by the said company, and the same power and authority was thereby given to the said corporation and their successors of making rules, orders, and bye-laws at the Court of Dredging of the said manor and royalty of *Whitstable* for carrying on, regulating, and managing the said fishery as were then vested in the said company.

The widows of freemen of the company, and the eldest sons of freemen on their attaining the age of 16, are entitled to their freedom; and the defendant is the treasurer of the company, and withholds the sum of 5*l.* in his hands, which the plaintiff is entitled to recover in this action, as his share of the stint or profits made by the joint trade in oysters of the freemen of the said manor, royalty, and fishery, in case the order or bye-law above set forth be not valid. Prior to and at the time of making the order or bye-law, and before the passing of the act of parliament, the plaintiff was and still is a freeman of the company, but before he became such was and still is a member of an ancient company called the *Seasalter* Company, which during all that time has held an oyster-ground on the *Kentish* shore, called the *Pollard*, under lease from the Dean and Chapter of *Canterbury*, and has been concerned in the trade

trade or business of sending oysters to the market of *Bil-  
lingsgate* for sale from such oyster-ground; all which  
premises were known to the freemen of the *Whitstable*  
Company at the time the plaintiff became a freeman  
thereof, and at the time of making the order or bye-law.  
The case then stated that the fine was duly demanded  
of the plaintiff, that he refused to pay the same, and that  
he is liable to pay the same, and has incurred the pe-  
nalty of such refusal in case the order or bye-law is  
valid in point of law; which is the question for the opi-  
nion of the Court: if it is not, the verdict is to stand;  
if it is, a nonnuit is to be entered.

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*Hobroyd* for the plaintiff, argued against the validity  
of the bye-law on several grounds; and first he objected  
that it was not warranted by the usage stated in the  
case, which was simply an usage to make orders for re-  
gulating the company and fishery, with fines and penal-  
ties for the breach of such orders, to be levied out of the  
share of the profits accruing to the individual freeman;  
whereas this bye-law did not merely regulate the com-  
pany by imposing penalties to be deducted out of the  
profits, but deprived the freeman of his entire share of  
the profits until the penalty was paid; and supposing  
his share of the profits in the interval to amount to  
100*l.*, still he must pay the penalty. In the case of *The*  
*Gunmakers Company v. Fell (a)*, a similar objection to  
the bye-law, viz. that a stop was to be made of the  
members' proof until conformity or payment of the pe-  
nalty, was pronounced by *Willes C. J.* to be a good ob-  
jection; but the action there not being founded on that

(a) *Willes R.* 384.



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part of the bye-law, it afforded no argument; but here the action is expressly founded on that part of the bye-law, which it was not in that case; and although a bye-law may be good in part and bad in part, that is only where the two parts are distinct; but here the parts by which the penalty is imposed, and the payment enforced form one entire thing. Secondly, the case states, that the widows of freemen and the eldest sons of freemen; without any restriction, at a certain age are entitled to their freedom; and that this bye-law excludes all such as shall be concerned in any other fishery on the *Kenish* coast; but a bye-law which narrows the number of the eligible is void (a): and this goes farther, for it excludes those who were not only eligible, but had an inchoate right to be elected. Thirdly, it is void, as being in restraint of trade, imposing a limitation on persons before entitled to be admitted, not agreeable to the original constitution of the company; for which reason in *Rex v. Coopers' Company* (b), and *Rex v. Tappenden* (c), it was resolved that the bye-laws could not be supported. It is true that in *Rex v. Faversham* (d) Lord *Kenyon* said, that there was nothing illegal in partners agreeing to prevent any one partner carrying on a separate trade elsewhere, and that the same thing might be done by a bye-law; but that question was not determined; and it may be observed upon it, that what may well be made the subject of contract between the different interests in a partnership would not be good as a bye-law (e); for in the case of a corporate body, which acts by a majority, the Court will take care that it acts

(a) *Rex v. Phillips*, *Bull. N. P.* 211. S. C. cited in *Burr.* 1836. 1838, 9.

(b) 7 *T. R.* 543.

(c) 3 *East*, 186.

(d) 8 *T. R.* 352.

(e) 17 *Ves.* 323.

for the good of the body, and according to the usage and custom. It may be urged farther, that the plaintiff at the time of his admission was known to belong to another company, and that he was admitted a freeman before the making of the bye-law, and before the company was incorporated.

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*Abbott*, contra, urged that the bye-law, which was for the purpose of securing to the company the undivided personal exertions of each member, was reasonable in its object, and conformable to the constitution of the company, which was, that each member should contribute his labor towards its support. As to the objection that the bye-law was not warranted by the usage, he answered, that it was *an order for regulating the company and fishery with a fine for the breach of it*, and was within the instance expressly stated of an order *prohibiting the freemen from using any other oyster grounds or being in partnership with any other*. It does not intermeddle with the rights of persons who are not members, nor prohibit those who are members from continuing such, so long as they choose to continue 'so exclusively; and is it not a reasonable mode of regulating the company and fishery to provide that so long as any member shall choose to apply the benefit of his labor not for the company but to its prejudice, so long he shall not be intitled to a share of the profits, but that those profits shall be shared among those who labor for the company? And as to the mode of enforcing the payment of this penalty, if the law gives a power to impose a penalty it gives also the means of enforcing the payment, which may be either by action, or by deduction out of the member's share of the profits, or by  
that

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that which is similar, though it goes perhaps somewhat farther, withholding his share till the penalty is paid. Still the question is, whether this is not a reasonable mode of enforcing it. It is submitted that it is; that as it operates only on the party's share of the joint profits, it is not like a distress, because that subjects the goods of the party and even his house to disturbance. To another objection, that the bye-law affects the rights of persons who had an inchoate right to become members, it may be answered, that the inchoate right is subject to the usage and must be governed by it; and as to this being an *ex post facto* law, after the plaintiff had become a freeman, he cannot complain of a law to the observance of which he has bound himself, if it be for the regulation of the company.

Lord ELLENBOROUGH C. J. A bye-law giving a remedy by distress for the recovery of the penalty would be bad. And is not this worse? The company are not content with levying the fine, but they withhold all share of the profits till the fine is paid. Is not that going vastly beyond the power of merely imposing a penalty for contumacy with a direction to stop it out of the profits? And there is not any instance stated which goes beyond that extent. Assuming therefore this bye-law in other parts of it to be good on general principles, and in conformity with the policy of the original constitution of the company, and I believe it is not an unfrequent bye-law that members of one company shall not be members of different companies, is not this a penalty upon a penalty? I think there is a great deal in the argument, that the inchoate rights of persons acceding to the body are to be taken as subject to the

laws to be made for the regulation of the body; but if there be not any usage to authorize the exclusion of the freemen from all share of the profits until the penalties be paid, it seems to me that this bye-law goes too far in that part of it; it is exercising a power beyond that given by law. It is true, undoubtedly, that if the law give a power of inflicting a penalty, where it gives the end, it also gives the common means of attaining it by action, but it does not give any extraordinary means. On this ground alone the case may be decided; and it becomes unnecessary to determine how far, if the bye-law had not contained these extraordinary means of compelling payment of the penalty, it might in other respects have been good. It certainly is a bye-law not authorized by any usage stated in the case.

1813.

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ADLEY  
against  
REEVES.

LE BLANC J. If the usage only authorizes the infliction of a penalty and stops there, I am not aware of any case which shews that a bye-law may go farther than the common-law mode of recovering it by action.

BATLEY J. The effect of this bye-law would be to mulct the party to the whole extent of his profits, however great they might be, supposing he had not the means of paying 10*l*.

*Per Curiam,*

Judgment for the plaintiff.

1813.

Saturday,  
Nov. 6th.

DOE, on the several Demises of Sir F. SYKES  
and R. BENYON, *against* DURNFORD (a).

A notice to quit in writing, signed by the party giving it, and attested by a witness, must be proved by calling that witness, or his absence must be accounted for; proof that it was served on the tenant, that he read it, and did not object to it, is not sufficient.

**EJECTMENT** to recover a messuage and premises in the parish of *Motcombe* in the county of *Dorset*, tried before *Chambre J.* at the summer assizes for that county 1812, when a verdict was found for the plaintiff upon the demise of *R. Benyon* subject to the opinion of the Court on the following case :

By an order of the court of chancery on the 25th of *May* 1805, purporting to be made in a cause there depending in which Sir *F. Sykes* an infant, &c. was plaintiff, and *Warren Hastings, Edward Sykes* and others defendants, praying on behalf of the said Sir *F. Sykes* as tenant in tail in possession of certain estates of which the premises in question are parcel, for an account of the rents and profits which had been received by the said defendants, and that a receiver might be appointed during the plaintiff's minority, it was referred to the Master to appoint a receiver, and *R. Benyon* (the lessor of the plaintiff) was thereupon appointed such receiver on the 1st of *February* 1806, and has continued so ever since. The defendant was in possession of the premises as tenant from year to year before *Michaelmas* 1806, but how long before did not appear, and is still in possession; and held them under a yearly rent which he paid up to 1811, once to *Benyon* himself but at other times to his agent; who gave receipts signed by him in his own name generally, and not as agent. The agent never

(a) This case was argued at *Serjeants'-Inn*.

shewed

1813.

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 Dox  
 against  
 DURNFORD.

shewed the order to the defendant, but frequently told him that *Benyon* was appointed receiver; and it appeared by conversations between the agent and the defendant, that the defendant was well aware of that circumstance when he paid the agent the rent. On the 25th of *September* 1811, a notice in writing dated the 20th of *September* to quit the premises at *Lady-day* next was served on the defendant, which the defendant read and made no objection to it. This notice was produced at the trial, and appeared to be signed by *R. Benyon*, and also to be attested by a subscribing witness in these words, "witness to the signature of the said *R. Benyon* — *John Price*." The signature of *Benyon* to the notice was not proved by the said *J. Price* the subscribing witness, nor was his absence accounted for; but it was proved by a witness that the land-steward of *Benyon* brought to him two notices, of which the above notice was one, inclosed in a letter franked by *Benyon*, which the steward told him he had received from *Benyon*, and desired him to get served upon the defendant, which he accordingly did. Objection was taken that the notice to quit was not sufficiently proved, the subscribing witness to it not being called, and there not being sufficient evidence to prove that it came from *Benyon*.

The question for the opinion of the Court is, whether the plaintiff is intitled to recover: if the opinion of the Court should be in the affirmative, the verdict is to stand; otherwise a nonsuit is to be entered.

*Bayly*, for the plaintiff, contended that the giving a notice like the payment of money was proved by the fact; and therefore it need not be in writing, but a  
 parol

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Doe  
against  
DURNFORD.

parol notice was good ; and that the notice in question was not produced for the purpose of shewing that it was signed by *Benyon*, but only that it was served ; and here it was proved that it was served, and that the defendant did not object to it, which was sufficient, *Doe v. Forster (a)*. And he cited *Roe v. Pierce (b)*, where it was held that a parol notice to quit given by the steward of a corporate body was sufficient without shewing an authority under seal from the corporate body ; for it was said that by bringing the ejectment they authorized and adopted his act. And the same inference may be made in this case.

LORD ELLENBOROUGH C. J. The objection to it as a parol notice is, that it appears to be a written one, and as a written one that the hand-writing of the party was not proved by calling the attesting witness. It is among first principles, that if the hand-writing must be proved and there be an attesting witness to it, that witness must be called or his absence accounted for.

DAMPIER J. The execution of a bond is a fact, but the obligor's subscription must be proved by the attesting witness if there be one. This might be a notice from any stranger.

*Per Curiam,*

Judgment of nonsuit.

(a) 13 *East*, 405.

(b) 2 *Camp. N. P. C.* 96.

1813.

H. PLATT and MARY his Wife *against* POWLES (a). *Saturday, Nov. 6th.*

CASE by plaintiff and wife in right of the wife as reversioner in fee of a messuage and lands in the parish of *Bridstow* in the county of *Hereford*, against the defendant as husband of *Elizabeth*, tenant for life of the said premises, for cutting down timber trees. Plea, not guilty.

At the trial before *Graham B.* at the last *Lent* assizes for *Herefordshire*, a verdict was found for the plaintiffs damages 13*l.* 18*s.* 3*d.* subject to the opinion of the Court on the following case :

*Thomas Smith* being seised in fee of the reversion of the premises mentioned in the declaration expectant on the decease of *Sarah Smith* his mother, who was entitled thereto for her life, on the 13th of *November* 1783 by his will devised to his wife *Elizabeth* the said reversion to hold to his wife *for and during the term of her natural life, and from and after her decease to the heirs of her body by him (the testator) lawfully begotten or to be begotten, and for want of such issue* to his brother-in-law *James Rudge* and the heirs of his body lawfully to be begotten; subject nevertheless to the payment of 200*l.* to *Mary* the daughter of his sister *Elizabeth Wiltshire* within 12 months after the decease of his wife, but in case there should be no issue of the body of *J. Rudge* then he devised the same unto the said *Mary* her heirs and assigns for ever. On the 6th of *October* 1784 the tes-

Devise of a reversionary estate in a messuage, &c. to the testator's wife for the term of her natural life, and from and after her decease to the heirs of her body by the testator lawfully begotten, or to be begotten; and for want of such issue remainder over; the wife is tenant in tail after possibility, after the period from her husband's death, when she might have had issue by him, though there never was any issue of the marriage.

(a) This case was argued at *Serjeants'-Inn*.



1813.

PLATT  
against  
PAWLES.

tator died leaving his wife *Elizabeth* him surviving, who afterwards intermarried with the defendant and is now living. *There never was any issue of the marriage of the testator with Elizabeth his wife. S. Smith* the mother of the testator died about the 13th of *October* 1786; and thereupon the defendant in right of his wife took possession of the estate. *J. Rudge* one of the devisees died a bachelor in 1808; and *M. Wiltshire* the other devisee married *H. Platt*, and she and her husband are the plaintiffs. The defendant after his intermarriage with the widow, and after the death of *S. Smith* the testator's mother, and also of *J. Rudge*, and after the intermarriage of the plaintiffs, cut down the timber trees mentioned in the declaration, and sold them for the sum for which the verdict was given.

The question for the opinion of the Court is whether the plaintiffs are entitled to recover: if the Court shall be of opinion that they are entitled, the verdict is to stand; if not, a nonsuit is to be entered.

*Abbott*, for the plaintiffs, after premising that their right to recover would depend on the question whether the defendant and his wife in right of his wife were more than bare tenants for life under the will, contended that they were not. He said it was to be argued on the other side that the wife was tenant in tail after possibility; and he admitted that a person might be tenant in tail after possibility as well of a remainder as of a present estate (a); but he denied that any one could be seised of such an estate without having been at some antecedent period tenant in special tail. In *Co.*

(a) 11 Rep. 81.

*Lit. 28. a.* it is laid down that as an estate tail was originally carved out of a fee simple, so is the estate of tenant after possibility out of an estate in especial tail. Now the wife never was tenant in special tail; for though if there had been issue the law would have given her a remainder in tail, notwithstanding the testator intended to give it her only for life, yet as the possibility of her having issue that might inherit was at an end at the instant when the remainder first vested in her, she only took an estate for life. The will only speaks so as to vest the estate, at the death of the testator; and with his death, there never having been any issue of the marriage, the limitation to the heirs of her body by the testator begotten became an impossible limitation; and therefore never took effect. It is true that one state of facts might be imagined, which would have given the wife an estate tail; namely, if the testator had died leaving her enceinte, and a child had been afterwards born; but if that had been the case it should have been shewn; for although during the lives of husband and wife, be they never so old, the law will presume the possibility of issue; yet, after the death of either of them no such presumption can be made.

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 PLATT  
*against*  
 POWLES

Lord ELLENBOROUGH C.J. There is not any case I believe which has decided, that it is to depend on the event of issue being born whether the party shall take an estate tail. If the words of the will be sufficient to constitute the party tenant in tail, and she might by possibility be such, they are not to be disappointed in their operation by the fact; if the party might by possibility have had issue that would inherit, that will be sufficient.

1813.

PDATT  
against  
FOWLER.

LE BLANC J. A posthumous child would have taken by descent.

BAYLEY J. There might have been issue en ventre as mere at the time of the testator's death; and until that was ascertained how could it be pronounced that she was not tenant in tail. A possibility therefore existed for a time, and that is the thing to look to and not to the event.

DAMPIER J. For nine months after the testator's death there was a possibility of her having issue of the body of her husband. At the time of his death she might not have ascertained the fact, she might not have been one month gone: there was a possibility therefore during the whole period of gestation that she might have issue; and the event cannot vary it. It is the possibility and not the probability to which the law looks; and here the possibility was not at all more remote than that which exists between parties of an age passed child bearing.

Judgment of nonsuit.

Monday,  
Nov. 28th.

DOE, on the several Demises of Sir M. B. FOLKES and the Dean and Chapter of ExETER, against CLEMENTS.

The lord may enter for waste committed by copyholder for life, though there be an intermediate estate in remainder between the estate of copyholder for life and the lord's reversion.

EJECTMENT brought by Sir M. B. Folkes lessee under the Dean and Chapter of Exeter of the manor of Staverton, to recover possession of certain

copyhold

copyhold premises within that manor, on the ground of a forfeiture. At the trial before *Graham B.* at the last assizes for the county of *Devon*, it appeared that the defendant held these premises as tenant for life under a copy of court-roll of the said manor, within which manor there was a custom for widows to have the estate during their widowhood. The defendant's daughter was also entitled under another copy of court-roll to an estate in remainder expectant upon the death or forfeiture of her father's estate, and had been admitted in reversion. There was no doubt upon the evidence that the defendant had committed waste by cutting trees; but it was objected, that as the daughter was intitled upon the death or forfeiture of the father, the lord had no title to enter and could not maintain this ejectment. The learned Judge, however, directed the jury to find for the plaintiff, giving leave to the defendant to move.

1813.

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 Dox  
 against  
 CLEMENTS.

*Jekyll* now moved accordingly for leave to enter a nonsuit upon the point reserved; but the Court confirmed the direction of the learned Judge, saying, that waste was an injury to the lord, for which this remedy would lie at his suit; for if it were otherwise the tenant for life and reversioner by combining together might strip the inheritance of all the timber.

Rule refused.

1813.

Monday,  
Nov. 8th.

## BUSS against GILBERT.

A debt due on a judgment signed in an action for damages after an act of bankruptcy committed by defendant, and a commission issued thereon, is not discharged by the certificate, though the verdict was obtained before the bankruptcy.

IN this action, which was an action for seducing the plaintiff's daughter, the plaintiff obtained a verdict for 150*l.* in August 1812. On the 2d of November a commission issued against the defendant upon an act of bankruptcy committed on the 12th of October preceding, and the defendant was duly declared a bankrupt, and obtained his certificate on the 10th of April 1813. On the 30th of June following the plaintiff signed final judgment and in September took the defendant in execution upon a ca. sa. issued on the said judgment.

*Comyn* moved under these circumstances for a rule nisi for discharging the defendant out of custody; and mentioned the case *Ex parte Charles* (a), where it was ruled that a verdict in an action for damages was not a good debt to support a commission of bankruptcy founded on an act of bankruptcy between verdict and judgment; which case he admitted was against him, and that the circumstances here were very similar: but he said that this application was made in order to raise a different question upon the stat. 5 *Geo. 2. c. 30. ss. 7. and 41.* whether this was not a debt barred by the certificate. Upon that point he also admitted that according to *Bamford v. Burrell* (b) the certificate would not discharge a debt which accrued between the act of bankruptcy and the issuing of the commission; but he contended that this was a debt which when perfected

(a) 14 *East*, 197.(b) 2 *Bos. & Pull.* 1.

by judgment, had relation to the time of verdict which was prior to the act of bankruptcy; and therefore the certificate would operate in discharge of it. The Court however refused the rule; Lord *Ellenborough* C. J. saying that he thought it was governed by the case *Ex parte Charles*, where this subject was very much discussed, and the Court looked into it with particular anxiety, and overturned the case of *Longford v. Ellis(a)*.

Rule refused.

(a) 14 *East*, 202. cited in argument.

**The KING against STOKES.**  
Same against Same.

*Monday,*  
*Nov. 8th.*

THESE were rules for informations in nature of quo warranto which were moved for on the 21st of June in last *Trinity* term against the defendant; the first for exercising the office of common council man, the second for exercising that of mayor of the borough of *Pembroke*. The affidavits in support of the rules stated that by the constitution of the borough there ought to be one mayor and twelve common council men and no more; but that for some years past a great many persons, exceeding the number of twelve, without any lawful warrant or title, had exercised and usurped the offices of common council men, and that the defendant on the 13th of July 1807, notwithstanding there were at that

though they had not elapsed before the rule nisi. But a title to one office which is a qualification to hold another office is not within s. 3. of the statute respecting derivative titles, and therefore although the party had exercised the first for 6 years, the Court made the rule absolute for an information for exercising the second office upon a defect of title to the first.

The 32 G. 3. c. 58. which enables a person to plead that he held or executed an office 6 years before exhibiting a quo warranto information, means 6 years before making the rule absolute for the information, and not 6 years before obtaining the rule nisi; and therefore the Court refused to make the rule absolute where the 6 years had then elapsed,

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The King  
against  
Stokes.

time twelve common council men, had usurped the office of common council man, and on the same day was duly sworn in; and farther, that on the 16th *October* 1809 the defendant usurped the office of mayor, although he was not at that time one of the twelve common council men out of whom the mayor ought to have been chosen.

*The Attorney General, W. E. Taunton and Owen,* shewed cause, and as to the first rule they referred to the 32 G. 3. c. 58. which enables a defendant to an information in the nature of quo warranto to plead that he held or executed the office six years before the exhibiting of the information; and contended that the Court would not do so nugatory an act as to grant an information, when it appeared that the defendant was in a condition to plead the statute to it with effect.

*Abbott (with Scarlett)* in support of the rule, contended that the application for the rule nisi was to be considered as the first step of the proceeding, and as that had been made within six years, the Court in furtherance of the rights of parties would refer the exhibiting of the information itself to that time, or allow the information to be exhibited nunc pro tunc.

Lord ELLENBOROUGH C. J. The words of the statute are "before the exhibiting of the information;" and I do not think that leaves us any latitude of interpretation. Where a statute limited a time within which a "prosecution must be commenced" there I believe Lord *Kenyon* and the Judges held that the information and proceeding before the magistrate within the time was enough, without preferring the indictment within the

the time (a); but the words there are different from these.

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The KING  
against  
STOKES.

DAMPIER J. I remember a similar application having been refused in a former case in which I was; and the same argument was used on that occasion as has been now used.

*Per Curiam,*

Rule discharged.

The same arguments were urged against the second rule, and also that the statute was passed for the quieting the possession of persons who had exercised franchises, and for preventing others from lying by for a length of time with latent objections to their titles; and it was insisted that the question upon this rule was in effect the same as on the last, inasmuch as the defendant's title to be mayor depended on his title to be common council man; and if he was a good common council man, which had been decided and cannot now be controverted, he was a good mayor. And the third section of the statute, for the protection of derivative titles, was referred to, as well as the general rule laid down in 4 *T. R.* 284. and also *Rex. v. Peacock* (b) where *Ashhurst* J. said that the meaning of the rule was that a corporator, after a quiet possession for six years, shall be taken to be a good officer *to all intents and purposes*.

On the other side it was denied that this case fell within the terms of the third section respecting derivative titles; because that section speaks only of titles derived under an election, nomination, swearing in or

(a) *Willott's case*, 1 *East. P. C.* 186.

(b) 4 *T. R.* 684.

admission



1813.

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The KING  
against  
STOKES.

admission of any person, in which case they shall not be affected by reason of any defect in the title of the person electing &c., in case such person has been in the exercise of his office six years; but this is not a title derived under the election &c. of any person whose title is sought to be disturbed; but the title of this party himself to be common council man is a necessary qualification of his title to be mayor. Unless therefore the statute can be shewn to extend to titles necessary as qualifications to other titles it will not apply.

Lord ELLENBOROUGH C. J. Upon the other rule I thought the party could plead the statute effectually and without question; but here it may be a question whether he can do so; and therefore I think we should leave him to put it on the record.

LE BLANC J. This is a title not derived under the former title, but built upon it.

DAMPIER J. This is not a case of title derived under that of common council man; but a case where a previous qualification is necessary by being a common council man, which the party has been for six years.

*Per Curiam,*

Rule absolute.

1813.

The KING *against* WARLOW.*Monday,  
Nov. 8th.*

UPON shewing cause against a rule obtained last term for leave to file informations in nature of quo warranto against the defendant and seven others, for exercising the office of burgess of the borough of *Pembroke*, it appeared by an affidavit on the part of the defendants, that on the 25th of *October* last they attended at the council-chamber of the town and borough of *Pembroke*, and requested the mayor and common council men then and there duly assembled to accept the resignation of their franchises as such burgesses, which the mayor and common council men agreed to do, and that they did then resign their franchises accordingly, and the order and acceptance of their resignation was entered in the council book, and signed by the mayor, and 15 common council men; and they now stated, that they did not claim or pretend to be burgesses of the said town and borough.

The Court will make the rule for a quo warranto information absolute, although the party has since the rule obtained resigned his office, and his resignation has been accepted. The Court will not consolidate several informations against several persons for distinct offices, for there must be an information against each to enable each to disclaim.

*W. E. Taunton* submitted, that under these circumstances the Court would not make the rule absolute, as the persons no longer stood in the character complained of; and that at all events they would not permit eight several informations to be filed, but would direct them to be consolidated.

Lord

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The King  
against  
WARLOW.

Lord ELLENBOROUGH C. J. said, that assuming it to be a valid resignation, still the rule must be made absolute; for a resignation was not an answer, although it might regulate the discretion of the Court in imposing the fine; and as to the other point, there must be several informations, in order to enable each defendant to disclaim, for this was not a joint offence: and *Dampier J.* added, that in the *Launceston* case he remembered one information was tried, and the rest suspended upon an undertaking of the other parties to disclaim according to the event of the trial.

*Per Curiam,*

Rule absolute.

*Abbott* (with *Scarlett*) in support of the rule.

Tuesday,  
Nov. 9th.

Warrant of attorney to confess a judgment to three, and one dies, the Court will permit judgment to be entered by the survivors.

FENDALL and Others *against* MAY, Bart.

THE defendant gave a warrant of attorney to confess a judgment, in an action of debt at the suit of *Fendall, Evans, and Jelf*, for 1574*l.* money borrowed of the said three persons. *Fendall* was since dead, and now *Abbott* moved for leave to enter up judgment on the part of the survivors. He admitted that a warrant given by two persons, to enter up judgment against the two, would not warrant a judgment against one alone if the other died, because the authority must be pursued, *Gee v. Lane* (a); but he took a distinction, that

(a) 15 East, 592.

as here the judgment prayed was to be entered up *by* and not *against* the survivors, the authority would be substantially pursued by suffering it to be so entered, and no additional inconvenience could arise from it to the defendant; and he cited *Todd v. Todd (a)*, and *Futcher v. Smith (b)*, where similar applications had been granted.

1813.

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FINDALA  
against  
MAY.

Lord ELLENBOROUGH C. J. observed, that the alteration in the state of parties being only in the persons charging and not in the persons to be charged, might make a material distinction; and after consulting with the other Judges said, that they were not embarrassed by the case of *Gee v. Lane*, and therefore that leave might be granted.

*Per Curiam,*

Rule absolute.

(a) *Barnes*, 48. S. C. by the name of *Todd v. Dodd*, 1 *Wils.* 312.

(b) *Bl. R.* 1301.

### BRACEGIRDLE *against* ORFORD and Others.

Tuesday,  
Nov. 9th.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and without any legal, reasonable, or probable cause whatsoever, and *under a false and unfounded charge and assertion that the plaintiff had stolen property in her house*, searching and ransacking the same, and making disturbance, &c.; per quod the plaintiff was not only interrupted in the quiet enjoyment of her dwelling, but *her credit and character were and are injured* by reason of a belief excited amongst

Trespass for breaking and entering plaintiff's dwelling-house may be well laid to have been done *under a false charge and assertion that plaintiff had stolen property in her house, per quod she was injured in h. r. credit, &c.* for that

it is only as matter of aggravation: and the jury may give damages for the trespass as it is aggravated by such false charge.

her

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BRACEGIRDLE  
against  
OXFORD.

her neighbours, in consequence of such searching, that she was a receiver of stolen goods knowing them to have been stolen, &c.

Plea, general issue; and there was also a justification under a leave and licence of the plaintiff, which was denied in the replication.

At the trial at the last assizes at *Chester* a verdict was found for the plaintiff, damages 50*l*.

*Barnes* now moved in arrest of judgment, or for a new trial on the ground of a misdirection. Upon the first ground he took this exception to the declaration, that it alleged the trespass to have been committed under a false charge and assertion, per quod the plaintiff was injured in her credit, &c.; which was combining with trespass other matter that is properly the subject of an action of slander; and if this could be done, he said it would be in effect enlarging the time limited for bringing actions on the case for slander, wherever the slander happened to be accompanied with an act of trespass. Upon the other ground he stated that the learned Judge had directed the jury "that if they believed the plaintiff's witnesses, he thought there certainly was something very like a charge of having stolen goods in the house, and if so the damages undoubtedly ought not to be merely nominal." This he contended was in effect directing the jury to give damages for the false assertion, which they ought not to have done, but only for the trespass; and he insisted that it was clear the jury had given damages on that account, because the actual damage proved was very slight.

LORD ELLENBOROUGH C. J. As to the exception taken to the declaration, the trespass is the substantive allegation, and the rest is laid as matter of aggravation only. On the other point, it does not appear that the learned Judge told the jury they might go beyond the damages for the trespass and consider the rest as a subject of substantive damage, or in any other wise than as connected with the trespass; and that is the constant course of considering it. In actions for false imprisonment the jury look to all the circumstances attending the imprisonment, and not merely to the time for which the party was imprisoned, and give damages accordingly: so here, the breaking and entering the plaintiff's dwelling-house for the purpose of searching it, and under the false charge, constitutes the trespass; and the false charge was not left as a distinct and substantive ground of damage.

1813.

BRACEGIRDLE  
against  
ORFORD,

LE BLANC J. It is always the practice to give in evidence the circumstances which accompany and give a character to the trespass.

*Per Curiam,*

Rule refused.

1813.

Tuesday,  
Nov. 9th.

**The KING against The Commissioners for inclosing Lands in the Parish of DEAN, in the County of CUMBERLAND.**

A private inclosure act, which gives an appeal to the quarter sessions within four months after the cause of complaint shall have arisen, to the party grieved by any thing done in pursuance of that or of the general inclosure act (other than and except such determinations as are by that or by the general inclosure act declared to be binding, final, and conclusive) does not give any appeal to a party complaining that the commissioners have omitted to set out a particular road as a public road, against their determination: and supposing it did, yet he must appeal within 4 months, and cannot after that time when the commissioners set out the road as a private road appeal against that determination, his cause of complaint being that it is not set out as a public road, and not that it is set out as a private road.

It seems that an indictment against the commissioners, for not obeying an order of sessions directing them to set out the road as a public road, would not be such a remedy to the party, supposing him entitled to have the road so set out, as would make the Court refuse to interfere by mandamus.

**T**HIS was a rule nisi for a mandamus to the commissioners under the 49 G. 3. c. 13. (local and personal, not printed) for inclosing lands in the parish of *Dean* in the county of *Cumberland*, commanding them to set out as a public road a certain road particularly described, extending across part of the commons in the said parish, pursuant to an order of sessions made in that behalf. The affidavits disclosed these facts, that the commissioners in or about *June* 1809, in pursuance of the directions contained in the 8th section of the general inclosure act, which is incorporated in the private act, set out and appointed the public carriage roads and highways through and over the lands and grounds intended to be inclosed by the private act, and gave the usual notice thereof in the newspaper named in that act, and in such notice appointed a meeting to be holden by them, for the purpose of hearing objections to the public roads and highways so set out, on the 26th of *July* then next: that one *Walker*, conceiving himself aggrieved by the setting out such public roads and highways over the said commons, directed his agent to attend the meeting, and point out to the commissioners the alteration which he wished to have made: that

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the agent attended the meeting on the 26th of *July*, and explained to the commissioners and to a justice of the peace who attended the meeting, the objection of *Walker* to the public roads and highways as set out by the commissioners, and the additional road which he (*Walker*) wished to be set out as a public road, and which had previously been a public road; and the commissioners seemed to think it reasonable that such road should be set out; but it was objected to by their clerk, who said it was unnecessary; that the commissioners then agreed that two of their own body whom they named should wait on *Walker* in a day or two upon the subject, and that the commissioners and justice did not come to any determination on the subject of the objection whilst the agent of *Walker* staid at the meeting, and neither of the two commissioners named ever afterwards called on *Walker* on the subject, and that he never had any notice or intimation whatever that the commissioners and justice had determined against his objection to the public roads as set out by the commissioners, nor had he any reason whatever to understand or believe that they had come to any such determination until on or about *January* last, when he saw an advertisement or notice in the newspaper of the private roads set out by the commissioners over the commons and wastes, amongst which was the road which he had applied to have set out as a public road: that the road in question has hitherto been constantly used as a public road, and has not in any manner been stopped up: that at the request of *Walker* a person attended the meeting of commissioners for hearing objections to the private roads set out by them over the commons and wastes on the 20th of *January* last, which was attended by a justice

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of the peace, and made application on behalf of *Walker* to have the road in question set out as a public road, when he was informed by the clerk to the commissioners in their presence that the application was too late, as the matter had been determined long since. On the 10th of *April* last *Walker* gave notice that he would prosecute an appeal against the commissioners at the next quarter sessions for the county, which he accordingly did; and on the hearing of that appeal the court of quarter sessions ordered that the road in question should be set out as a public road by the commissioners, who having refused to obey that order, the present application was made.

*Topping, Fell, and G. Lamb* shewed cause, and objected to the jurisdiction of the sessions upon two grounds; first, that no appeal lay, inasmuch as the determination of the commissioners was made final by 41 G. 3. c. 109. s. 8. (general inclosure act), not being within the proviso in that section which gave an appeal to the quarter sessions. And as to the private act, they said, that by the appeal clause in that act (a) all such cases as were made final by the general inclosure act are ex-

(a) 49 G. 3. c. 13. enacts, "that if any person shall think himself aggrieved by any thing done in pursuance of this act, or of the general inclosure act herein recited, (other than and except such determinations as are by this act or by the said recited act declared to be binding, final, and conclusive, &c.) he may appeal to the general quarter sessions of the peace which shall be holden for the said county within 4 calendar months next after the cause of complaint shall have arisen, on giving to the said commissioners, or any one of them, and to the party concerned, 14 days notice in writing of such appeal, and of the matter thereof, and the justices not interested in the premises in such sessions assembled, are hereby required to hear and determine the matter of such appeal, and to make such order therein, and to award such costs and damages as to them shall seem reasonable."

pressly

pressly excepted out of that clause; therefore no appeal would lie. But, secondly, supposing an appeal to lie, here it was out of time, because the private act says that the party shall appeal within four calendar months next after the cause of complaint; which in this case was in *June* 1809, when the commissioners set out the public roads. Lastly, they insisted that as another remedy was open to the party by indictment for disobedience to the order of sessions, this Court would not interpose by *mandamus*.

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*Paley* and *P. Courteney* contra, did not deny the general rule, that if there be another specific legal remedy the Court will refuse to interfere by *mandamus*, but they insisted that an indictment could not properly be termed a remedy, and much less a specific remedy, i. e. such a remedy as the case demands; for indictment is only a proceeding in *poenam* for the past, and not a remedy for the future. Upon the second objection they said, that it was material to consider what the cause of complaint here was, in order to see whether the appeal given by the clause in the private act before alluded to was out of time. They contended that this road being set out as a private road, was the cause of complaint, and that did not arise before *January* last, when notice of it was given. But even admitting that it arose in 1809, when the public roads were set out, and this road was not included among them, still the party ought not under the circumstances to be precluded from his appeal. Nothing was done by the commissioners at their meeting in 1809, which could be considered as determining the claim of the party to have the road set out, and it was understood at the time that nothing would

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be done without giving him notice; and it appears that the party had no intimation of any determination before January 1813. He had therefore a right to suppose during the interval that no determination had taken place, and was not called upon to stir until some act was done; as long as no act was done he might think no time was lost, and therefore he shall not be prejudiced by his acquiescence; and they cited *Rex v. Justices of Wilts (a)*. Upon the first objection they urged that this case did not fall within the exception in the appeal clause in the private act, which was not of an import so extensive as contended for on the other side. The exception extends only to such determinations as are by that act or the general act declared to be binding, final, and conclusive: it is argued that the determination of the commissioners is made final, binding, and conclusive by the 8th sect. of the general act; but that section only requires the commissioners to order and finally direct, without saying that it shall be binding and conclusive. It is therefore not a determination which is made binding and conclusive by the general act, and so the argument that it is within the exception in the private act fails. If the exception were held to extend to all cases where the commissioners were directed finally to determine, it would exclude every case of appeal. The words in the appeal clause in the private act are very general; they are, "if any person shall think himself aggrieved by any *thing* done," which are large enough to comprehend this case.

LORD ELLENBOROUGH C. J. Upon the objection of there being another remedy in this case, I cannot help

(a) 1 East, 683.

thinking

thinking that what has been observed by the counsel in support of the rule is extremely material; and that an indictment would not afford that convenient mode of remedy which might be attained by mandamus. But upon the right of the party to appeal, it seems that the private act excepts such determinations as are by that or the general act declared to be binding, final, and conclusive: and we have not been referred to any clause in the general act, whereby any determinations are directed to be binding, final, and conclusive, in those express words, or otherwise than by the 8th section, which requires that the commissioners shall order and finally direct. The exception therefore in the private act must have been intended to refer to such determinations. As to the lapse of time, supposing we had the power, I very much doubt whether we should exercise it after the party has laid by for upwards of three years without following up his complaint, which is equivalent to acquiescing under it. The cause of complaint was the not setting out this road as a public road, for unless it was kept alive by the commissioners as a public road, it became extinguished by the operation of the general inclosure act (a), the act extinguishing all roads except those saved.

BAYLEY<sup>9</sup>J. What is stated in the case as to the commissioners having agreed to wait on *Walker* in a day or two ought not to have induced him to remain quiet for three years. The not setting out the road as a public road was the gravamen.

DAMPIER J. The grievance commenced from the time when the order for setting out the public roads

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was made; for the not setting out this road amongst the others amounted to shutting it up; for the general act (a) enacts, that those which are not set out shall be stopped up and extinguished; and therefore until something was done to continue the road he was aggrieved. The setting out the private roads came afterwards; but the grievance is not that this road is set out as a private road, but that it is not set out as a public one; which arose from its being omitted to be set out on the first occasion.

*Per Curiam,*

Rule discharged.

(a) See 41 Geo. 3. c. 109. s. 11.

Tuesday,  
Nov. 9th.

### READ *against* GOLDRING.

A tender by the agent of defendant of the whole sum demanded by plaintiff, by pulling out his pocket-book and offering if he would go into a neighbouring public house to pay it, which the plaintiff refused to take, is good, although the agent is only authorized by the defendant to tender a sum short of the whole sum demanded, and offers the rest at his own risk.

IN an action for goods sold, tried before *Graham B.* at the last assizes for the county of *Southampton*, the defendant pleaded a tender of 4*l.* 10*s.*, to prove which a witness stated that he was directed by the defendant to go to the plaintiff, that he had no money from the defendant to pay the plaintiff, but had money of his own, and went to settle for the canvass, which was the subject of the plaintiff's demand. That he met the plaintiff in the street, told him he was come to settle the business between the defendant and him, and that he was desired by the defendant to offer him 4*l.*; the plaintiff said he would not take it; the witness then said that he would give him the other 10*s.* out of his own pocket, and run the risk of being repaid. He then pulled out his pocket book and told plaintiff if he would go into a neighbouring public house he would pay him;  
the

the plaintiff said he would not take it. Upon this evidence a verdict was given for the defendant, the learned Judge reserving liberty to move to enter the verdict for the plaintiff.

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*Pell* Serjt. accordingly moved for that purpose, upon the same objection as was taken at the trial, viz. that the evidence did not amount to proof of a tender of 4*l.* 10*s.* by the defendant but of 4*l.* only, the sum which he directed his agent to tender.

But the Court refused the rule, saying that as the agent had tendered the whole sum, it could not make any difference that he had taken on himself the risk of tendering the 10*s.*

Rule refused.

DOE d. JAS. BURRELL, *against* BELLAMY and  
Another.

*Wednesday,*  
*Nov. 10th.*

EJECTMENT for a copyhold estate at *Gedney* in the county of *Lincoln*.

At the trial before *Thomson B.* at the last *Lincoln* assizes, it appeared that the estate in question formerly belonged to *D. Burrell* who devised it to *M. Griffin* for life with remainder in fee to *Robert Burrell*. On the death of the tenant for life in 1800, *R. Burrell* the remainder man in fee being supposed to be dead, proclamations for the heir were made in the usual manner at the court baron; and no person appearing to make claim, in 1802 the lands were seized by *Bellamy* as

A person claiming to be admitted as heir to a copyhold need not tender himself to be admitted at the lord's court, if the steward upon application to him out of court has refused to admit him.

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lord of the manor, who demised them to the other defendant. In 1809 the lessor of the plaintiff appeared and claimed as heir of *R. Burrell*; and made application by his attorney to the steward of the manor out of court, stating his claim, and asked whether he would admit him. The steward answered, that the lord of the manor was absent, and he could not take upon himself to admit him until he returned. The jury found a verdict for the plaintiff.

*Copley* Serjt. now moved to set it aside, on the ground that the lessor of the plaintiff should have tendered himself to be admitted at one of the lord's courts, and that what had been done on the present occasion could not be considered as equivalent to an actual tender of himself at the lord's court: but the Court refused the rule; and *Dampier* J. observed that what had been said by the steward was a dispensation with *Burrell's* attendance at the lord's court.

Rule refused.

Wednesday,  
Nov. 10th.

### ATTREE against ANSCOMB and Others.

A bond conditioned for the payment, by quarterly payments, of an annual rent, is within the 48 G. 3. c. 149. sched. part 1. which imposes a duty on bonds given as a security for the payment of any definite and certain sum of money, and must be stamped accordingly.

DEBT on bond by the plaintiff as treasurer to the commissioners for paving the town of *Brighthelmstone*, against the defendant *Anscomb* as principal, and the two other defendants as surties, for 1730*l.* conditioned for the payment by *Anscomb* to the plaintiff by four equal quarterly payments of the yearly rent of 865*l.*, for the tolls arising from the market of the said town, let by the said commissioners to *Anscomb* for two years commencing

ing the 1st of *June* 1810 and ending the 31st of *May* 1812. At the trial before *Heath J.* at the last assizes for *Sussex*, upon the production of the bond which bore a 3*l.* stamp, it was objected for the defendant, that by 48 G. 3. c. 149. the stamp ought to have been 4*l.*, as upon a bond given as a security for the payment of a sum of money exceeding 1000*l.*; and the learned Judge being of that opinion, directed a nonsuit.

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*Lawes* moved to set aside the nonsuit, and contended that this was not a bond falling within the description given in the schedule of the act. The schedule part 1. imposes a duty on "bonds given as a security for the payment of any definite and certain sum of money," which this bond was not. It was a security, not for the payment of a definite and certain sum, but for the payment of rent, which is uncertain and may be suspended by eviction, and depends altogether on the continuance of the tenancy; and if this bond be within this branch of the schedule then a bond given on a lease for 21 or more years would also be within it, and must have an ad valorem stamp upon the whole amount of the rent to accrue during the whole number of the years; which would be highly burthensome, and could hardly be intended. It is true, that in another branch of the schedule, a duty is imposed upon "bonds given as a security for the payment of any annuity or of any sum of money at stated periods;" but there an exception is made of "rent reserved or payable upon any lease," so that this bond is expressly excepted out of it; and perhaps it comes nearest to that description of bond which is merely for the performance of covenants,

and



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and upon which breaches may be assigned under the  
8 & 9 W. 3. c. 11.

LORD ELLENBOROUGH C. J. The same may be done perhaps under some bonds which are not conditioned for the performance of covenants, but for the payment of sums certain (a). The second branch of the schedule, which has been cited, by excepting this case shews clearly that it falls under the first branch, which makes no such exception, and it explains the first. As it is excluded by express provision out of the latter branch, so it falls within the generality of the first. It seems to me that this is a bond for the payment of a definite and certain sum though payable at future periods.

LE BLANC J. The legislature by excepting it out of one provision and omitting to do so in the other, have shewn that they meant it to come within that provision.

*Per Curiam,*

Rule refused.

(a) See *Collins v. Collins*, 2 Burr. 820. *Walcat v. Goulding*, 8 T. R. 126. *Willoughby v. Swinton*, 6 East, 550.

Wednesday,  
Nov. 10th.

### CRUCHLEY against CLARANCE.

A bill of exchange drawn and issued in blank for the name of the payee may be filled up by a bona fide holder with his own name, and will bind the drawer.

THIS was an action against the defendant as drawer of a bill of exchange for 200l.; the declaration contained several counts, and in one stated the bill to have been made payable to the order of the plaintiff, and in another to the order of — (thereby meaning to the order of such person as the defendant should cause to be

be named and inserted in the said bill as payee), and then averred that the defendant caused the name of the plaintiff to be inserted &c. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last term, it appeared that the bill had been drawn by the defendant in *Jamaica* upon one *Henry Man* of *London*, the defendant leaving a blank for the name of the payee, and had afterwards been negotiated in this country by one *Vashon*, who indorsed it to the plaintiff in payment of an old debt, and the plaintiff inserted his own name as the payee. A verdict was found for the plaintiff.

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*Denman* moved to enter a nonsuit or for a new trial, on the ground that the plaintiff had no right to insert his name in the bill; and he said it was distinguishable from *Russel v. Langstaffe* (a); because there the bill was filled up by one of the original parties.

LORD ELLENBOROUGH C. J. As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant by leaving the blank undertook to be answerable for it when filled up in the shape of a bill.

LE BLANC J. It is the same thing as if the defendant had made the bill payable to bearer.

BAYLEY J. The issuing the bill in blank without the name of the payee was an authority to a bona fide holder to insert the name.

*Per Curiam*,

Rule refused.

(a) *Doug.* 513.

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*Wednesday,  
Nov. 10th.*ROE d. BENNETT, *against* JEFFERY.

A single instance of a surrender in fee by tenant in special tail of a copyhold estate is evidence to prove a custom within the manor to bar entails by surrender, though the surrenderor has not been dead 20 years, and though one instance be proved of a recovery suffered by tenant in tail to bar the entail.

THE lessor of the plaintiff claimed certain copyhold premises within the manor of *Washington* in the county of *Sussex*, as heir in special tail to *Mary Wood* under a surrender and admittance in 1738 of *William Wood* husband of the said *Mary* to himself for life, to *Mary* for life, to the heirs of the body of *Mary* by *William* begotten or to be begotten, and for default of such issue to the right heirs of *William* for ever. The defendant claimed under an absolute surrender in fee of the said premises made in 1775 by *William Wood*, only son of the said *William* and *Mary*, the then tenant in special tail. At the trial before *Heath J.* at the last assizes for *Sussex* the question was, whether there was a custom within the manor to bar entails by surrender; in support of which custom the defendant proved one instance, which took place in the same year as the surrender in question, of a surrender by *Jeronomy Michael* then tenant in special tail to the use of *R. Penfold* in fee, which said *J. Michael* died about thirteen years ago: but there was also proof on the part of the plaintiff of one instance, as far back as 1736, of a recovery suffered by tenant in tail to bar the estate tail. Upon this evidence the learned Judge directed the jury to find for the defendant, saying that the custom to bar entails by surrender was a convenient one, and that he thought there was sufficient evidence of such a custom.

*Best* Serjt. moved for a new trial, insisting that the single instance of the surrender of *J. Michael* in

1775 was not sufficient to support the custom contended for by the defendant. In the first place, he said that as 20 years had not elapsed since the death of *J. Michael*, and therefore a right of entry still existed in her issue or heir in tail, non constat that they might not dispute the surrender; and therefore a conclusion in favor of the custom could not be drawn from this instance, because to warrant such a conclusion, it ought to appear that he to whose use the surrender was made had enjoyed the land against the issue in tail: but supposing the surrender good as evidence of the custom, it was a single instance only, and was met *è contra* by one instance, and that of a much earlier date, of barring the entail by a recovery. And it does not appear that there is any particular convenience arising from this mode of barring the entail.

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LORD ELLENBOROUGH C. J. The evidence unresisted is certainly evidence of a custom. It is true that one act undisturbed does not make a custom, but it will be evidence of a custom.

LE BLANC J. It was a fact upon which it was competent for the jury to find such a custom.

BAYLEY J. The surrender was done in open court; and thirteen years have elapsed since the death of the surrenderor, and the surrender has never been controverted.

DAMPIER J. It has been decided, in the case of a customary descent, that a single instance is evidence to prove the custom (*a*). If frequent instances of barring

(\*) See *Doc v. Mason*, 3 Wils. 63.

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by recovery had been proved, which is inconsistent with the mode by surrender, there would have been weight in the argument; but where there is such a paucity of instances in each mode, it only proves that probably there were very few entails.

Rule refused.

Thursday,  
Nov. 11th.

SIMEON and Others *against* BAZETT. (a)

Policy of insurance on ship and goods at and from London to any ports in the Baltic, with liberty to carry simulated papers and clearances, and until safely warehoused in the warehouses of the consignees at the port of discharge, at 40 guineas per cent. premium: held that the underwriter was liable for a loss arising from confiscation by the Prussian government, notwithstanding the persons in whom the interest was averred were Prussian subjects, Prussia not being at war with this country; it being found that at the time of effecting the policy all direct commerce between this country and the ports in the Baltic was prohibited by the powers possessing ports there, but that notwithstanding, an extensive course of commerce was carried on between this country and those ports by means of simulated papers and clearances, which was well known to all descriptions of persons such as plaintiffs and defendant.

THIS special verdict was argued by *Marryat* for the plaintiffs, and *Carr* for the defendant, and stood over for consideration. The principal cases referred to in argument upon the point on which the Court afterwards gave judgment, were, besides those mentioned in the judgment, *Rotch v. Edie* (b), *Mennett v. Bonham* (c) and *Flindt v. Scott* (d). On this day Lord *Ellenborough* C. J. delivered the judgment of the Court in substance as follows:

This was a special verdict: it was an action on a policy of assurance, and the policy was dated September 26th, 1810; it was on the ship *Sophia* at and from London to any port or ports in the Baltic sea, or gulph of Finland, backwards and forwards, with liberty to touch, stay, discharge and unload her cargo, and tranship it by any other vessel or vessels, at any

(a) This case was argued at *Serjeants'-Inn* before the commencement of last *Easter* term.

(b) 6 T. R. 413.

(c) 15 East, 477.

(d) *Ibid.* 325.

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port or ports in *Sweden*, to wait for orders and for any purposes whatsoever at or off any ports or places, and to return and discharge at any port or ports, to carry and exchange simulated papers and clearances, to seek, join and exchange convoys, including the risk of craft and until safely warehoused in the warehouses of the consignees at the final port or place of discharge, upon any kind of goods and merchandizes, and also upon the body, tackle &c. of the said ship. Then it was declared by the policy that the insurance was against all risks, that in case of loss, capture, seizure or detention, the insurers were to pay the loss in two months after notification of it without waiting for official documents or condemnation, and that the goods were warranted free from *British* condemnation, but not from any other consequences of *British* detention. The premium was a hundred guineas on 250*l.*, and the interest is averred in persons, who are found to be *Prussian* subjects resident at *Colberg* in *Prussia*, and the seizure to have been near *Colberg* by persons exercising the powers of government. And it is averred there was a total loss in consequence of such seizure. The special verdict states that the plaintiffs being *British* subjects and merchants residing in *London* and dealing as such in their firm of Messrs. *Simeon* and Co., shipped on board the *Sophia* the goods mentioned in the first and third counts of the declaration. It also states, that the assurance was made by the order and on the account and risk of certain *Prussian* subjects resident at *Colberg* in *Prussia*, who are averred to be the persons interested, and who were interested, and to whom the plaintiffs consigned such goods. Then it states the petition for the licence, and the granting of the licence, the terms of which it is unnecessary to state inasmuch as nothing turns upon the

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licence in this case. It is farther stated by the special verdict, that the ship with her cargo sailed from *London* for *Colberg* a port within the dominions of the King of *Prussia*, bearing the *Swedish* flag and carrying simulated papers and clearances purporting that she had sailed from *Gottenburg*; and that the ship and goods having arrived near *Colberg* were seized and detained by certain persons exercising the powers of government in *Prussia*, and that the goods were sequestered, confiscated and lost to the parties interested by an act of condemnation at *Berlin* in *Prussia*, signed by members of the Royal *Prussian* immediate commission appointed by the King of *Prussia* for the execution of arrests laid on colonial produce, and which act is in the terms there stated, which are these; "His majesty the King of *Prussia* having acceded to the continental system adopted by his majesty the Emperor of *France* and King of *Italy*, and to this end caused it to be made known that, in pursuance of the principles of this system for stopping the trade with *England* her colonies and allies, all colonial produce arriving by sea in the *Prussian* states are, without examination as to their origin, to be considered as belonging to the *English* trade, and immediately to be delivered over to the fiscus, unless convincing proofs are produced, immediately on arrival of the ship, either by the captain, or owner of the cargo, or any body else, that the goods are introduced either in consequence of the licences granted by the *French* authorities, or as prizes made on ships belonging to the crown of *England*, or her subjects; and as these conditions cannot be complied with in regard to the cargo of colonial produce arrived in the port of *Colberg* with the ship *Sophia*, therefore the said cargo is hereby adjudged to the fiscus

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to be transferred immediately conformably to the existing agreements with the French authorities." The special verdict farther states, what is a material part as it respects the judgment of the Court, that long before and at the time of effecting the policy in the first and third counts of the declaration, all direct commerce between *Great Britain* and the several ports in the *Baltic*, and gulph of *Finland*, had been and was prohibited by the respective powers possessing ports therein; but that notwithstanding such prohibition, an extensive commerce had during all that time been and was carried on between such ports and *Great Britain* by means of simulated papers, and clearances, importing that the vessels and their cargoes, really sailing from *Great Britain*, had sailed from other countries, and with licences from the *British* government; and that such course of carrying on commerce was well known to and understood by merchants and underwriters and their agents before and at the time when the policy was effected. The special verdict then concludes in the usual form.

As the commerce insured by this policy was not destined for nor imported into a hostile country, *Prussia* not being at war with this country, all consideration respecting the licence becomes immaterial. The persons in whom the interest is averred appear to have been *Prussian* subjects resident at *Colberg*. The ship is found to have sailed for *Colberg* under the *Swedish* flag, and to have been arrested and detained by persons exercising the powers of government in *Prussia*, and to have been confiscated by an act of condemnation at *Berlin* by *Prussian* subjects appointed by the King of *Prussia*. The right of the plaintiffs to recover is

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resisted on the authority of *Conway v. Gray* (a) and *Conway v. Forbes* (b), and several other cases cited in argument, one of which is *Touteng v. Hubbard* (c); which proceeded on this principle that an assured cannot by law recover an indemnity for a loss occasioned by the act of his own government. Assuming those cases to have been well decided, and this loss also to have been occasioned by the condemnation of the *Prussian* government, the question to be considered is, whether there do not exist in this case such circumstances of distinction, as will entitle the plaintiffs to recover notwithstanding those decisions. And we are of opinion that such circumstances do exist. There is no doubt that an insurance upon an *American* ship against *American* embargo might be good, notwithstanding the act of embargo might be considered as an act of the party's own government who effected the insurance; for not only an insurance against the act of his own government, but even against his own act might be good, if the underwriter was disposed to enter into so hazardous a risk. But in the cases of *Conway v. Gray* and *Conway v. Forbes* the embargo never was an object of insurance between the parties, nor was it in their contemplation at the time of the insurance. Here the cause of loss arose from the course of commerce, which was carried on by means of simulated papers and clearances, when all direct commerce between *Great Britain* and the ports in the *Baltic* was prohibited; and such a course of commerce is found by the verdict to have existed before the time of effecting the insurance, and to have been well known by merchants and under-

(a) 10 East, 536.

(b) *Ibid.* 539.

(c) 3 Bos. &amp; Pull. 291.

writers

writers and their agents, to which classes of persons the plaintiffs and defendant respectively belonged. The policy contains an express liberty to carry simulated papers and clearances; and as the voyage was to be conducted on the footing on which the special verdict finds the trade to have then existed, that is by means of simulated papers and clearances, it is clear that the trade meant to be insured was a trade to be conducted by means of such papers. Every merchant shipping goods for the *Baltic* knew at the time the possibility of seizure; and by way of affording a general protection against such risks the trade was in general carried on in the name of others for the benefit of individual subjects of this country, against which the acts of *France* were aimed. The perils therefore likely to result from such a trade were in the contemplation of the parties at the very time of effecting the policy, and were so expressed in the policy, which was extended beyond the usual period, including risk until safely warehoused in the warehouses of the consignees. Can it be conceived that the assured would bargain for an indemnity at any premium, much more at this enormous premium without securing an indemnity against seizure in the port of intended destination; that port being a port belonging to the country of the assured? In favor of the rights of the assured and to preclude a loss or injury falling on those who were meant to be exempted from it, we must intend this to be a loss within the meaning of the parties. The exclusion of risk occasioned by the act of the assured's own government is only an implied exclusion from the reason and fitness of the thing, which, however may be rebutted by circumstances. As the perils occasioned by the act of the party's own government

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are held to be excluded on the reason of the thing, so they may be held to be included whenever the reason of the thing requires it. We are therefore of opinion that on this special verdict there must be judgment for the plaintiffs.

Thursday,  
Nov. 11th.

### HAGEDORN against BAZETT. (a)

Although a licence "to plaintiff of *London*, merchant, on behalf of himself and other *British* and neutral merchants to export on board a certain vessel bearing any flag except the *French*, a specified cargo from *London* to any port in the *Baltic* not under blockade, and to whomsoever the property may appear to belong," was held not to protect a part of the cargo which was the property of *Russian* subjects at the time of the shipment, *Russia* being then at war with this country, so as to entitle the plaintiff to recover in respect of that part upon a policy effected by him as the agent for and by the orders of those *Russian* subjects, the loss being occasioned by seizure and confiscation in a *Russian* port by commissioners appointed by the *Russian* government; yet as the licence was also obtained and the policy effected by the plaintiff on his own account, and as agent for certain *Hamburgers* who were respectively interested in separate and distinct proportions of the cargo: held that plaintiff was entitled to recover in respect of his own interest and that of the *Hamburgers*, *Hamburg* being in a state of permissive neutrality with this country.

**A**SSUMPSIT on a policy of assurance, dated the 8th of *August* 1810, upon goods to be thereafter valued on board the ship *Frau Eliabe*, at and from *London* to any port or ports in the *Baltic* backwards and forwards, including the risk of transhipment into boats &c. and also inland navigation and land carriage, until safely delivered at the warehouses of the different consignees, with leave to seek, join, and exchange convoy, carry and exchange simulated papers, clearances, and ship's papers, sail under any flag, touch, stay, and trade at all ports, places, and islands for all purposes, take in and discharge goods wherever the ship might touch at, with liberty to wait for information off any ports and places, take in and land passengers, and with leave to load, unload, and reload the cargo at *Gottenburg*, *Aboe* or elsewhere, as well as to alter the marks and forms of

(d) This case was argued at *Serjeants'-Inn* before the commencement of last *Easter* term.

the goods or packages, papers and clearances without being deemed a deviation, and in case of loss, capture, seizure or detention by any power whatever to pay a loss within two months after receipt of advice thereof by the assured without waiting for official documents, at a premium of thirty guineas per cent. to return ten per cent. on arrival. Loss by seizure, taking and detention of persons unknown. Plea, general issue.

At the trial before Lord *Ellenborough* C. J. at the *London* sittings after *Hilary* term 1812, a verdict was found for the plaintiff, damages 250*l.*, subject to the opinion of the Court on a case, with liberty to either party, by leave of the Court, to turn it into a special verdict.

The case stated, that the plaintiff, a *British* merchant resident in *London*, caused the policy to be effected, which it set forth; and that in *August* and *September* 1810 the plaintiff shipped the goods on account of himself and the several persons mentioned in the case, who were separately interested in the several proportions stated, and who were all resident at *Hamburg*, except the plaintiff, who was interested in the proportion of one fourth, and Messrs. *Wohlf* and *Schlusser*, who are subjects of the Emperor of *Russia* and domiciled there, and were stated to be interested in the proportion of one sixteenth. In order to protect this shipment the plaintiff on his own behalf and as the agent for the several persons interested, and by their orders, applied for and obtained on the 9th of *Aug.* 1810 a licence "to *J. P. H. Hagedorn* of *London*, merchant, on behalf of himself and other *British* or neutral merchants, to load and export on board the vessel "*Frau Eliabe*," bearing any flag except

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the *French*, a cargo (as therein described,) and such goods as are permitted by law to be exported, except hemp, from *London* to any port in the *Baltic* not under blockade, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any neutral or hostile port and to whomsoever such property may appear to belong." The ship sailed for *St. Petersburg* where *Wohlf* and *Schlusser*, to whom the goods were consigned, had a house of trade, and in consequence of meeting with bad weather put into *Liebau*, a port in the dominions of the Emperor of *Russia*, in distress on the 23d November 1810, and was immediately seized by a military force acting under the authority of the Emperor of *Russia*, and the cargo was afterwards taken out, and although the utmost exertion was used by the consignees to procure the restoration of the goods insured, the whole of the cargo was condemned by certain commissioners for neutral navigation acting under the authority of the Emperor of *Russia*, and in consequence thereof, the goods insured became wholly lost to the persons interested. Before and at the time of the insurance and loss there was open war between *Russia* and this country. The case also stated the same facts respecting the situation of *Hamburgh*, and the same orders in council as are stated in *Hagedorn v. Bell (a)*.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover for all or any part of the interest insured, and the verdict is to be entered for such sum as the Court shall direct; and in case the plaintiff is not entitled to recover any part, a nonsuit is to be entered.

(a) *Ante*, vol. 1. p. 450.

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*Taddy* for the plaintiff, contended that the licence extended to cover as well the *Hamburgh* and *Russian* interests as that which was *British*; and in support of that proposition, as to the *Hamburgh* interest he took the same grounds that were afterwards taken in *Hagedorn v. Bell* (a), and as to the *Russian* he adopted the arguments that were used in *Mennett v. Bonham* (b), and *Flindt v. Crokatt* (c), and referred to the same authorities, and also to *Fenton v. Pearson* (d). And he farther contended that if the Court should be against him upon both or either of those points, still the insurance would be good for the rest, the interests of the several parties being found to be several; in the same manner as though it should be held that there were goods on board not within the licence that would not affect the licence in toto. And he cited *Bynkershoek Quest. Jur. Pub. lib. 1. c. 12.*, the case of the *Goede Hoop* (e) and *Jonge Clara* (f).

*Neunham* contra, maintained that the plaintiff was not entitled to recover upon any part; and as to that which was *Hamburgh*, he likewise urged the same arguments that were afterwards urged on the same side of the question in *Hagedorn v. Bell*. And as to the *Russian* interest he relied on *Mennett v. Bonham*, *Flindt v. Crokatt*, and *Same v. Scott* (g); and he farther insisted that if the insurance on the *Hamburgh* or *Russian* part of the cargo was illegal, the policy being entire, the whole was illegal, and for this he cited *Parkin v. Dick* (h), *Wilson v. Marryat* (i),

(a) 1 M. &amp; S. 450.

(b) 15 East, 477.

(c) Ibid. 522.

(d) Ibid. 419.

(e) Edw. Adm. C. 15. 336.

(f) Ibid. 372.

(g) 15 East, 525.

(h) 11 East, 502. S. C. 2 Camp. N. P. C. 221.

(i) 8 T. R. 31.

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and *Chalmers v. Bell* (a); and though it may be said that in *Parkin v. Dick* the goods all belonged to one person, and here to distinct persons, yet as the plaintiff acted as agent for all, and contracted for himself and all concerned, it shall not be permitted to him to alter the nature of the contract with respect to the underwriter, so as to sever the legal from the illegal part, *Shiffner v. Gordon* (b). He then contended that there was not that entire bona fides on the part of the plaintiff in the use of the licence which Sir Wm. Scott held to be essential to give effect to a licence, *The Cosmopolite* (c); inasmuch as the plaintiff after obtaining it for the purpose of covering his own and other *British* or neutral property, applied it to cover *Russian* property which was hostile, and he cited several cases to shew that licences are to be obtained by a fair and candid representation and to be fairly pursued; viz. *The Vriendschap* (d), *Twee Gebroeders* (e), *Nicoline* (f), *Minerva* (g). So in many cases where a neutral has endeavoured to mask the property of an enemy with respect to a portion only of his cargo, it has been held to amount to a confiscation of the whole, *The Eenrom* (h), *The Rosalie and Betty* (i), *The Odin* (k), *The Graaf Bernstorff* (l), *Bynkershoek*, *Quæst.*, J.P. lib. 1. c. 12. If the agent cannot protect himself, neither can he protect others; the principal is involved in the fraud of his agent, *Doe v. Martin* (m); and the Court of Admiralty adopts the same rule, *The Columbia* (n), *Calypso* (o), *Exchange* (p).

*Cur. adv. vult.*

(a) 3 Bcs. & Pall. 604.

(c) 4 Rob. Adm. Cas. 13.

(e) Edw. Adm. Cas. 95.

(b) 2 Rob. Adm. Cas. 9.

(d) 1 Rob. Adm. Cas. 250.

(m) 4 T. R. 66.

(o) 2 Rob. Adm. Cas. 160.

(h) 12 East, 304.

(d) 4 Rob. Adm. Cas. 96.

(f) Ibid. 364.

(i) Ibid. 358, 9.

(l) 3 Rob. Adm. Cas. 117.

(n) 1 Rob. Adm. Cas. 154.

(p) Edw. Adm. Cas. 43, 4.

(g) Ibid. 375.

Lord

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court in substance as follows:

This was a case reserved at *Guildhall* on a trial before me. It was an action on a policy of assurance on goods "at and from *London* to any ports in the *Baltic*." The question turns entirely upon the effect of the construction to be given to the licence which was granted to the plaintiff, who is described therein as of *London*, merchant, on behalf of himself and other *British* or neutral merchants. The question is, whether this licence extends to protect the whole property, or only a part. Unquestionably it cannot protect that part which is *Russian*, that country being then hostile. It was contended also, that it could not protect that part which was *Hamburgh* property, as that country was to be regarded as not being in a state of neutrality within the meaning of the licence, even if she were not to be regarded as an enemy. The first question then is, whether the contract of assurance was so entire as to be void in toto on account of either of these objections; and secondly, whether if not void in toto, it will cover the interest of the *Hamburghers*, as falling within the description of neutral. As to the first question, we think that the mere accidental circumstance of several persons having employed one common agent, does not communicate to the others the vice belonging to the property of one of the assured; but that the contract may be distributed. In this case there was no common or joint interest in the whole of the property insured subsisting in the different individuals, nor is there any fraud. Had there been a partnership amongst all the parties in the entire cargo, or even if any consent had been given to the employment of one common agent, the objection

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jection might have had a different effect; but as it now stands on the facts of this insurance, it must enure in point of legal effect as if it had been effected by separate agents and on distinct policies. As to the 2d objection, we think that the *Hamburgh* interest was well covered by this policy. The word neutral comprehends all subjects of all other states with which commerce is allowed to be carried on by existing orders of council, and against which states there has not been any declaration of war or act of hostility; which certainly was the case of *Hamburgh* at the time of this insurance. We are of opinion therefore under these circumstances that judgment must be given for the plaintiff as to the *British* and *Hamburgh* property, and for the defendant as to that part which was *Russian*.

Thursday,  
Nov. 11th.

### MELLISH and Another against ALLNUTT. (a)

Policy of assurance on goods at and from G. to the ship's port of discharge, beginning the adventure on the said goods from the loading thereof aboard the said ship: held that the policy did not cover goods loaded at an anterior port, though they were in a loaded state and in good safety at G. just before effecting the insurance.

ASSUMPSIT on a policy of assurance, dated the 7th of August 1810, lost or not lost, at and from *Gottenburgh* to the ship's port or ports of discharge in the *Baltic*, with liberty to carry, use and exchange simulated papers and clearances, and to touch at all ports and places for any and all purposes, and to seek, join and exchange convoys, warranted free from capture and seizure in the ship's port or ports of discharge, upon goods and ship called the *Suwarrow*, be-

Payment of money into court generally upon a declaration containing a count on a policy of assurance, and the money counts, is only an admission of the contract, but does not preclude the defendant from disputing his liability, beyond such payment, for goods which were not loaded according to the terms of the policy.

(a) This case was argued at *Serjeants'-Inn* before the commencement of last *Easter* term.

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ginning the adventure upon the said goods from the loading thereof aboard the said ship, and to continue until the ship arrived, and the goods were discharged and safely landed at a premium of ten guineas per cent. to return 5*l.* per cent. on arrival. The declaration averred that on the 2d of *August* 1810 the ship was in good safety at *Gottenburgh*, and divers goods of great value were then and there loaded on board to be carried from thence upon the voyage in the policy mentioned and bound upon such voyage, and then proceeded to aver the interest and a loss by capture on the high seas. There were also counts for money paid, had and received and on an account stated. Plea, general issue.

At the trial before Lord *Ellenborough* C. J. at the *Middlesex* sittings after *Trinity* term 1811, the Jury found a special verdict which stated in substance as far as concerns the present question as follows :

The policy was subscribed by the defendant at the premium stated in the declaration, and the defendant received the same. The goods intended to be covered by the policy were loaded on board the ship at *Christiansand* in *Norway* for the voyage insured, and the ship in the prosecution of such voyage arrived with the goods at *Gottenburgh* before the effecting of the policy, and just before effecting it, viz. on the 2d of *August*, the goods not having been unloaded after the shipping thereof as aforesaid, were on board the ship and together with the ship were in good safety there, and no other goods were put on board the vessel at *Gottenburgh* for the said voyage. The ship and goods were afterwards captured on the high seas in the prosecution of her voyage ; of all which the defendant had notice. And the defendant paid into court generally in this cause under the common rule of court

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court for that purpose the sum of 31*l.* 10*s.* being the amount of the premium. The special verdict then found that the defendant did not undertake &c. in manner and form as in the three last counts is alleged. But whether on the whole matter found he did undertake &c. as in the first count is mentioned &c. (in the usual form) and they assess the damages at 268*l.* 10*s.* besides costs &c. And if upon the whole matter it shall appear to the Court that he did not undertake &c. (in the usual form).

Upon the argument two questions were made; first, whether the goods shipped at *Christiansand* were or were not covered by the policy, at and from *Gottenburgh*, the usual blank for the place of shipment not having been filled up; secondly, whether the defendant was precluded from taking objection on the first question by having paid money into court generally.

*Marryat* for the plaintiffs, argued for the affirmative on both points, and upon the first he contended that it was enough that the goods were in a loaded state at *Gottenburgh*, and distinguished the cases of *Robertson v. French* (a), *Horney v. Lushington* (b), and *White v. Inglis* (c), from the present, inasmuch as in those cases the blank was filled up either with a place of loading or with words of reference to the place whence the risk commenced. And as to *Spitta v. Woodman* (d) though he admitted it was against him, yet he said that it was a single case, and that the Court were not inclined to adopt it in *Nonnen v. Reid* (e). Upon the second point he contended that the payment of money into

(a) 4 *East*, 130.(b) 15 *East*, 46.

(c)

(d) 2 *Taunt.* 416.(e) 16 *East*, 176.See also *Bell v. Holmes*,*ibid.* 240.

court generally was an admission by the defendant of his liability upon the contract alleged in every count, and operated as an estoppel against him, leaving only the quantum between the parties to be settled, which quantum the Jury had by their verdict ascertained; and he referred to *Bennett v. Francis (a)*.

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*Abbott* for the defendant, on the first point contended that the policy never attached because the loading on board the said ship meant a loading at *Gottenburgh*, and he relied on *Spitta v. Woodman*, where the Court felt obliged to yield to the same objection as now made, though it appeared that the underwriter knew the goods were loaded at an antecedent port, so that the objection came in a more unfavorable shape than here, where it is not found that any such knowledge existed. And he farther contended that there was a fatal variance between the averment that the goods were loaded at *Gottenburgh*, which was a material averment, and the finding of the jury; and he cited *Le Guidon, ch. 2. art. 1.* and *Hodgson v. Richardson (b)*. Upon the other point he said that though the payment into court amounted to an admission of the contract, it was like a payment on account, which would not preclude the party from disputing his farther liability, and could never estop the Court from deciding, upon verdict found, according to the legal effect of the contract; besides here the payment being found to be the amount of the premium, was referable to the common counts, and the jury had so referred it by finding upon those counts for the defendant.

*Cur. adv. vult.*

(a) 2 Bos. & Pull. 550.

(b) 1 Black R. 463.

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Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court in substance as follows: after stating the principal parts of the declaration and special verdict his Lordship continued: This is a special verdict found principally for the purpose of deciding a question of construction arising on the words of the policy; and the question is whether the words import that the goods were to be loaded at *Gottenburgh*, or whether the policy will cover goods laden antecedently, provided they were on board in a loaded state at *Gottenburgh*. As far as general reasoning and convenience may govern our decision, we must suppose that the making a policy to commence from the loading at a particular port is done in order to exclude the inconvenience of having to determine whether a prior damage may not have arisen to the goods before the commencement of the risk intended to be insured. This inconvenience is excluded by specifying that the loading shall be at a particular port: and the responsibility of the underwriter is thereby narrowed. If by the terms of this policy, it had been simply on a voyage at and from *Gottenburgh*, the adventure would have commenced from the loading at *Gottenburgh*; and the subsequent words, beginning the adventure from the loading thereof aboard the said ship, seem to have been introduced for the purpose of clearing up any doubt as to the risk, or rather perhaps for the purpose of making a more specific designation of its commencement. To construe the subsequent words "from the loading &c." to mean only the same thing as *being loaded*, would be giving them no effect, for that would be beginning the adventure at *Gottenburgh* without regard to the loading. It seems therefore to be the probable construction that the

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the loading meant must be subsequent to the ship's arrival at the port, and during the time she is at the port whence the voyage is to commence; and then the words "and to continue &c." will connect. If the word loading is to be understood in a grammatical sense as descriptive of an act to be done, and not of the goods being in a loaded state, it can only be applied to one specific place, viz. where the cargo is to be taken on board; whereas if it is to be understood as *being loaded* it will be descriptive of a loading at every place. The former is the more obvious and strictly grammatical construction. We are of opinion after much consideration that we shall not violate any rule of construction by construing this policy according to the construction of *Spitta v. Woodman*, which is the only case precisely in point with the present. In all the other cases there was a difference arising either from the terms of the policy, as in *Horneyer v. Lushington* where the words were "from the loading at the particular port (which port was expressly mentioned), or where they were" from the loading as aforesaid, or from the circumstances, as in *Nonnen v. Kettlewell* (a) where an unloading in part and reloading had taken place at the port. For these reasons we are of opinion against the plaintiff on this principal point. Another question arises on the effect of paying money into court generally. It is said that money having been paid into court generally, impliedly admits the cause of action on every count. But we think, that it is only evidence from which a conclusion of fact may be drawn, but that this finding cannot be considered as an allegation of the fact. The effect of paying money into court may depend on the terms of the

(a) 16 East, 176.

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rule under which it is paid in. How is the Court to judge of that effect, if the rule be not set out? and if set out in terms, still it would be only evidence, and the jury should have drawn the conclusion. It would not amount to more than an admission, that the party had entered into the contract, still leaving him at liberty to contend that he was not liable beyond the amount of such payment for goods which were not laden according to the terms of the policy. We are of opinion therefore on both points for the defendant.

Judgment for defendant.

Thursday,  
 Nov. 11th.

KOSTER and Others, Assignees of SWAN,  
 (Bankrupt), against EASON.

Where defendant's insurance brokers effected several policies of insurance, some in the name and on account of their own firm others in the name of their own firm but on account of their principals, and others in the name and on account of their principals, for which prin-

**A**SSUMPSIT for money lent, money paid, money had and received, and on an account stated, upon promises made to the bankrupt, and also to those assignees. Plea, general issue, with a notice of set-off. At the trial before Bayley J. at the Lancaster summer assizes 1812, a verdict was found for the plaintiffs, damages 275ol. 19s. 2d., subject to the opinion of the Court on the following case:

The plaintiffs are the assignees of Swan, who was an underwriter at Liverpool. The defendant and his partners they acted under a del credere commission, without the knowledge of the underwriters: held, that in an action brought against them for premiums by the assignees of one of the underwriters upon those policies, who had become bankrupt, the defendants might set off losses and returns due on all such of those policies as were effected in the name of their own firm, but not on such as were effected in the names of their principals, such losses and returns having become due on those policies before the time when the bankrupt stopped payment, though they had never been adjusted by the bankrupt, but only by the other underwriters between the time of his stopping payment and committing the act of bankruptcy, on which adjustment the defendants had given their principals credit for the amount.

ners, *Alston, Finlay, and Hodgson*, were insurance brokers at *Liverpool* under the firm of *John Eason and Co.* The course of dealing between *Swan* and *J. Eason and Co.* was for the latter, when they received orders for insurances from their correspondents, to present policies to *Swan* for his signature, who thereupon subscribed the same, and acknowledged the receipt of the premiums on the policies, and *J. Eason and Co.* became his debtors for the premiums, and when they had funds in hand, as has always been the case, paid the losses which occurred on such policies after they had been adjusted and signed off by *Swan*; and *Swan* had no other knowledge of the principals for whom the insurances were thus effected than the policies denoted. On the 14th of *January* 1811 *Swan* informed *J. Eason and Co.* that he had a bill of exchange returned dishonoured, and that he did not feel himself authorized to sign off any farther losses; and in fact he stopped payment and ceased to transact business on the 12th of *January*, and on the 28th wrote to *J. Eason and Co.*, requesting a statement of his underwriting account as early as convenient, stating that they would of course see the propriety of letting all pending losses, averages, and returns lie over for the present. On the 7th of *May* following he committed an act of bankruptcy, and on the 11th a commission was taken out against him, and an assignment was made to the plaintiffs on the 6th of *July*. The balance due from *J. Eason and Co.* to the credit of *Swan* on the said underwriting account on the 14th of *January*, and also on the 7th of *May* 1811, for premiums, for which this action is brought, amounted to 275*ol.* 1*9s.* 2*d.*; at both which times *J. Eason and Co.* held 19 policies of insurance, which they as insu-

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rance brokers had procured to be effected, and which had been previously subscribed by *Swan*, in manner before stated. Five of these policies were effected by *J. Eason* and Co., in the name and on the behalf of *B. A. Goldsmith* of London; four in the name and on the behalf of *James Finlay* and Co., who are partners in the firm of *J. Eason* and Co., but *J. Eason* and Co. are not in partnership with *James Finlay* and Co., the firm of *James Finlay* and Co. comprizing others than are in the firm of *J. Eason* and Co.; one in the name and on the account of *Finlay, Hodgson, and Co.*, the persons composing which firm are also partners in the firm of *J. Eason* and Co., but that latter firm are not in partnership with *Finlay, Hodgson, and Co.* Three in the name and on the behalf of *Eason, Alston, and Co.*, who are the same persons as constitute the firm of *J. Eason* and Co., and who hold the same shares in both concerns, *J. Eason* and Co. being general merchants, and also insurance brokers at *Liverpool*, and *Eason, Alston, and Co.* being general merchants at *Glasgow*; but this fact was not known to *Swan*; two in the name of *J. Eason* and Co., but on the behalf of the aforesaid firm of *Eason, Alston, and Co.*; three in the name of *J. Eason* and Co., and on the behalf of the aforesaid firm of *James Finlay* and Co.; and one in the name of *J. Eason* and Co., and on the behalf of the aforesaid firm of *Finlay, Hodgson, and Co.* Losses on all these policies had occurred, and returns had become demandable in respect of *Swan*'s subscription to the amount of 2822l. 12s. 7d. previously to the 12th of *January*, and these losses had been claimed by the assured from the underwriters with the exception of two policies, but none of the losses or returns had been formally adjusted or  
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signed off by *Swan* or any of the underwriters. Between the 12th of *January* and the 7th of *May* a great number of the losses and returns were adjusted and signed off by the other underwriters on the policies, and after the 7th of *May*, and before the commencement of this action, all the remaining losses and returns were adjusted and signed off by them; but *Swan* did not adjust or sign off any losses or returns whatever after the 12th of *January*, but was frequently present before the 7th of *May*, when the other underwriters adjusted and signed off losses, and knew that they were so done. *J. Eason* and Co. guaranteed to their respective principals at the time of effecting the several policies, but such guarantie was not known to the several underwriters, the due payment of all losses and returns on those policies; and they also from time to time as such losses and returns were adjusted and signed off by the other underwriters, gave their principals the assured credit for the amount of the losses and returns on the said several policies under the aforesaid guarantie, but they had no directions from *Swan* so to do. The defendant insists in this action, which is to be considered as if it had been brought against all the partners of the firm of *J. Eason* and Co., upon a right to set off the amount of such losses and returns as were due from *Swan* before his bankruptcy, and have been so settled by *J. Eason* and Co. with their principals.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover all or any, and what part of the sum of 275*l.* 1*9s.* 2*d.*: if they are entitled to recover all or any part, the verdict to stand, or be entered up accordingly; if otherwise, a nonsuit to be entered.

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This case was argued in last Trinity term by *Little-  
dale* for the plaintiffs, and *Scarlett* for the defendant.  
For the defendant the cases of *Group v. Dubois* (a), *Biss  
v. Dickason* (b), and *Wienholt v. Roberts* (c) were relied  
on; and for the plaintiffs a distinction was taken be-  
tween those cases and the present, viz. that there it did  
not appear that the del credere commission was un-  
known to the underwriters; and it was also said, that  
at all events they only applied to those policies effected  
in the names of *J. Eason and Co.*, and that in the two  
latter cases the losses appeared to have been adjusted.  
*Shee v. Clarkson* (d) was also cited.

Cur. adp. vult.

Lord ELLENBOROUGH C. J. on this day delivered  
the judgment of the Court as follows:

This was an action to recover the sum of 2750*l.*  
1*9s.* 2*d.* for premiums of insurance, and the question  
was, whether the defendant was entitled under the  
clause relating to mutual credit in 5 *Geo. 2. c. 30. s. 28.*  
to deduct for losses upon certain policies underwritten  
by *Swan*. *Swan* was an underwriter, and the house of  
*Eason and Co.* (in which the defendant was a partner)  
were insurance brokers, and it was from the house of  
*Eason and Co.* that the sum of 2750*l.* 1*9s.* 2*d.* was due.  
There were 19 policies upon which the right to set off  
was claimed, and of these five were effected in the name  
and on the account of *B. A. Goldsmidt*, four in the  
name and on the account of *James Finlay and Co.*, one  
in the name and on the account of *Finlay, Hodgson,  
and Co.*, three in the name and on the account of *Eason*,

(a) 1 T. R. 112.

(b) *Ibid.* 285.

(c) 2 Camp. N. P. C. 586.

(d) 12 East, 507.

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*Alston* and Co., *two* in the name and on the account of *John Eason* and Co., and *four* in the name of *John Eason* and Co.; but as to three of those four on the account of *James Finlay* and Co., and as to the fourth of them on the account of *Finlay, Hodgson, and Co.* The firms of *Eason, Alston, and Co.*, and of *John Eason* and Co., are composed of the same persons, but they trade in the former name at *Glasgow*, and in the latter at *Liverpool*; some of the members of those firms, but not all, are also partners in the houses of *James Finlay* and Co., and *Finlay, Hodgson, and Co.*, but there are also persons in the house of *James Finlay* and Co., who do not belong to the firms of *Eason, Alston* and Co., or of *John Eason* and Co. Of the 19 policies therefore five are in the name and on the account of the house from which the premiums are due; four more are in the name of that house, but not on its account, and the remaining ten are neither in the name nor on the account of that house. *Swan* never adjusted or signed off any of the claims upon these policies, and from the embarrassed state of his circumstances he avowedly declined it; but the house of *Eason* and Co. at the time of effecting those policies which were not on their own account guaranteed to the parties interested the due payment of all losses and returns, and upon the ground of that guarantee they insist that they have the same right of set-off upon those policies as they have upon the policies which were in their own name, and for their own account. The right of set-off upon the policies in their own names and for their own account was conceded upon the argument, and after the case of *Grove* and *Dubois*, and *Bize* and *Dickason*, in 1st Term Reports, which have been so long acted upon as the law

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upon this subject, we think rightly; but the right upon the other policies was disputed. The 5th of Geo. II. c. 30. s. 28. gives the right of set-off where there has been "mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person;" and as credit was undoubtedly given in this case by *Swan* to *Eason* and Co. for the premiums, the question is whether upon any of these policies it can properly be said that credit has been given by *Eason* and Co. to *Swan*; and we think there is a difference in this respect between the four policies effected in the names of *Eason* and Co. on the account of other persons, and the ten which were not effected in their names. Upon the four *Eason* and Co. could maintain an action in their own names, if they had a lien upon the policies; or if they had paid their principals, they could in their own names, and on their own account, and without any control from the principals, enforce payment; and by subscribing to a policy in their own names, *Swan* had consented that they should be at liberty to stand in the character and situation of principals, that in case of loss they should be entitled to act in all respects as his creditors, and that they should be considered as giving him credit upon the policy at their own risk, and on their own account. Upon the other policies, the ten, *Eason* and Co. could not sue in their own names; they can in no event, though they may have a lien upon the policies, or though they may pay their principals, bring any action but in the name of their principals. *Swan* has not consented that they should in any case be entitled to stand as principals, or to be treated as the creditors, nor has he ever agreed that they should be considered as giving him credit at their

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their own risk and on their own account. Their guaranteeing his solvency to the assured on those policies is a transaction to which he is wholly a stranger, and from signing the policies in the names of the assured to them as brokers he has not authorized *Eason* and Co. the brokers, by means of such their guarantee given by them to the assured, (of which he was not privy) to claim and exercise the rights of principals as against him. In *Grove v. Dubois*, 1 T. R. 112., and *Bize v. Dickson*, 1 T. R. 285. already mentioned, and which are the only cases in favour of the set-off on account of losses, the policies upon which the right to set-off was claimed, were all in the names, not of the persons interested, but of the broker who claimed the right of set-off. Those cases therefore, though authorities in point in this case in favour of the defendant as to the four policies, are no authorities as to the other ten, and as to those ten, we are of opinion, upon the principle of there being a want of mutuality of credit between the parties, that the set-off cannot be supported. The amount of the loss and returns upon the nine policies upon which we think the set-off allowable is 580*l.* 14*s.* 7*d.* This reduces the debt to 2170*l.* 4*s.* 7*d.*, and for that sum the verdict for the plaintiff must stand.

Another answer to the claim as to the ten policies is this, that it does not appear that the house of *Eason* and Co. have paid their principals, though they have given them credit for these losses and returns; and if they have not paid them, the allowance of this claim may either interfere with the rights of such principals, or may leave *Swan's* estate exposed to a farther claim from those principals. Suppose the house of *Eason* and Co. to become insolvent and unable to satisfy their guaranties,

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ranties, if the allowance of this set-off were to take away from the principals the right of claiming upon Swan's estate, it would be doing clear injustice to the principals, who ought to have the power of looking to Swan as their principal debtor, as well as to Eason and Co., the guarantees for his solvency; and if the allowance of this set-off were not to take away from the principals the right of claiming upon Swan's estate, it would be great injustice to Swan's estate; because in that case it would be liable to pay the principals a dividend, after having made Eason and Co. a payment to the extent of the whole demand.

Judgment for the Plaintiffs for 2170*l.* 4*s.* 7*d.* (a)

(a) See *Parker v. Smith*, 16 *East*, 382. and *Cumming v. Forrester*, 1 *M. & S.* 494.

Thursday,  
Nov. 11th.

### CRANLEY against HILLARY.

Where plaintiff, the drawer of a bill of exchange accepted by defendant, agreed with him and the rest of his creditors to take a composition of 8*s.* in the pound to be secured by promissory notes to be given by defendant payable on days certain, and that defendant should assign

to the creditors certain debts, upon which they should execute a general release; and the assignment was executed, and all the creditors except plaintiff received their composition and executed the release, and plaintiff might have received his promissory notes if he had applied for them, but it did not appear that defendant had ever tendered them to plaintiff, or that he had ever applied for them; and the plaintiff afterwards, and after the days of payment of the promissory notes had expired, sued the defendant on the bill of exchange: held that he was not precluded by the agreement from recovering.

8s. in the pound upon the amount of their respective debts by two instalments on the 1st of *September* and 31st of *December* following, to be secured by promissory notes to be given by the defendant, the same being guaranteed by *Frazer* and Co. payable on the above days; and that the defendant should assign to the creditors certain debts mentioned in the said resolution, upon which the creditors should execute a general release. In pursuance of this resolution it was proved, that the assignment was executed by the defendant; and all the other creditors, except the plaintiff and his partner, received their composition and executed a general release, and the plaintiff might have received his promissory notes if he had applied for them, but there was no evidence that the defendant had given or tendered them to the plaintiff, or that the latter had ever applied for them. His Lordship was of opinion under these circumstances that the plaintiff was entitled to recover, but upon being referred to the case of *Boothbey v. Sowden* (a), gave leave to the defendant to move; whereupon *Topping* now moved for a new trial, and referred more particularly to that case; which he said was an agreement very similar to the present, being entered into with the plaintiffs and the rest of the creditors of the defendant to take his notes by way of composition for their debts: and Lord *Ellenborough*, after stating that there was a sufficient consideration for such agreement, said, "if the plaintiffs could shew that the defendant had refused to give them the notes according to the terms of the agreement, they might be remitted to their original remedy, but that remedy is suspended by the

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(a) 3 *Camp. N. P. C.* 175.



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of the plaintiff, under which commission the plaintiff was declared a bankrupt, upon an act of bankruptcy alleged to have been committed by lying in prison two months, &c. from the 11th of *April* 1807, and that in order to obtain the commission on the 13th of *July* 1810, the said *Stewart* the petitioning creditor, made affidavit in writing, that the plaintiff was then indebted to him in the sum of 100*l.* *for money lent and advanced* by him to the plaintiff, and that the commission was awarded and issued on the said affidavit, and *that after the committing by the plaintiff of the act on which he was declared a bankrupt as aforesaid, and before the time of making the affidavit, to wit, in Trinity term in the 50th year of the king, the said Stewart recovered judgment in this court against the plaintiff for 105*6*l.** for his damages in an action upon promises, which judgment was signed on the 6th of *July* in the 50th year aforesaid, and that the said sum of 100*l.*, in which the said Stewart by his affidavit, swore that the plaintiff was indebted to him, was included in the damages for which the judgment was recovered, and was part of the sum of 105*6*l.**, and at the time of making the affidavit, was not but had ceased to be a debt *for money lent and advanced* or a simple contract debt, and was merged in and extinguished by the judgment, and was a debt of record. The plea then negatived, that the plaintiff at the time of making the affidavit or of awarding or issuing the commission or at any time since, was indebted to *Stewart*, except on the judgment, and that the judgment was still in full force &c.*

Replication to the third plea, that long before the time of awarding and issuing the commission of bankruptcy, and long before the contracting the debt to  
*Stewart*

*Stewart* upon which the commission was granted, to wit, on the 30th of *August* in the year 1806, he the plaintiff was a prisoner for debt, and detained as such, in the custody of the warden of the *Fleet*, and lay in prison upon such detention for two months and more, to wit, until and upon the 13th day of *November*, in the year last aforesaid, and that at and during the time of such detention, he was a trader, and was indebted to one *Flight* in the sum of 100*l.* and upwards, for a just and true debt then and still due and owing from him the plaintiff, and that the same was a good and sufficient petitioning creditor's debt, to support a commission of bankruptcy against him, and that he by so lying in prison committed an act of bankruptcy, and might have been found and declared a bankrupt, and that *Stewart*, at the time the debt was contracted to him on which he grounded his petition for the commission of bankruptcy, and at the time he made the affidavit and petitioned for the commission, had notice that the plaintiff had committed such prior act of bankruptcy, and of the other premises as aforesaid.

Replication to the last plea, that after the plaintiff had committed such act of bankruptcy as last mentioned, and after *Stewart* had notice of it, and before the awarding and issuing of the said commission, the plaintiff became and was indebted to *Stewart* in divers large sums of money, amounting to 3700*l.*, and did at divers periods pay to, and *Stewart* with full knowledge of such act of bankruptcy, received of the plaintiff divers sums of money amounting to 3000*l.* part of the 3700*l.*, and afterwards in *Hilary* term, in the 48th of the king impleaded the plaintiff in this court for the residue, and in *Trinity* term in the 50th year of the king, recovered  
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against the plaintiff 1056*l.* for his damages in the said action, which judgment at the time of the awarding and issuing the commission was and is in full force and effect, and that the sum of 100*l.* mentioned in the affidavit, was and is included in the sum of 1056*l.* so secured by the said judgment, and was a debt which might have been proved under the commission, and that *Stewart*, after the recovery of the said judgment, and whilst the same was in full force, to wit, on the 13th day of *July* in the year 1810, exhibited his petition for the purpose of obtaining a commission of bankruptcy against the plaintiff; and that upon such petition a commission was awarded and issued on the 17th of *August* 1810, against the plaintiff; and that *Stewart* did not, before he exhibited such petition and caused such commission to be awarded and issued against the plaintiff, *relinquish the said action.*

To these replications the defendant demurred, and assigned for causes, that it was not nor is competent to the plaintiff to set up or allege an act of bankruptcy, committed by him prior to that, or to the contracting of the debt upon which the subsisting commission of bankruptcy against him was applied for and issued, or to take advantage of any such prior act of bankruptcy, to invalidate the same commission; and also that the plaintiff hath not averred or shewn, that any sufficient petitioning creditor's debt to ground a commission of bankruptcy existed before, and at the time of the act of bankruptcy by him alleged to have been committed before that upon which the subsisting commission was awarded and issued, and also for that the same replications are, and each of them is, in

various other respects uncertain, informal, and insufficient, &c.

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*Abbott*, in support of the demurrer, contended that all the replications were bad. He said that the gist of the first replication was this, that inasmuch as the affidavit on which the commission was obtained was an affidavit of debt for money lent, and inasmuch as the simple-contract debt for money lent had, at the time when that affidavit was made, become a debt of a higher nature by the operation of the judgment, therefore the affidavit was insufficient in fact. But to this it may be answered, that the 5 Geo. 2. c. 30. s. 23. which requires the affidavit is merely directory (a). And, besides, it was competent to the petitioning creditor to proceed on the debt as it stood at the time of the bankruptcy, notwithstanding the subsequent judgment. Thus, in *Ambrose v. Clendon* (b), A. had 100*l.* owing on simple contract before an act of bankruptcy, and one was afterwards secretly committed, and then a bond was taken; and Lord *Hardwicke* held, that this did not so far extinguish the simple contract, as to deprive the creditor of petitioning for a commission. And he said (c), "The only question is, whether there was a debt subsisting sufficient to support the commission, and not of what effect the acceptance of the bond is with regard to the bankrupt himself; the reason why it is an extinguishment with regard to the party, is because the bond is a debt of a higher nature; but in this proceeding both debts are the same." As to the second replication, the substance, however informally it may be

(a) See *Hill v. Heale*, 2 N. R. 196.

(b) 2 Str. 1041.

(c) *C. Temp. Hardw.* 268.

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pleaded, is, that the plaintiff had committed an act of bankruptcy prior to the petitioning creditor's debt, and that there was a sufficient debt to support a commission on that prior act. But the answer to this is, that though this objection might well lie in the mouths of others, it is not competent to the *bankrupt* to make it: he cannot defeat his commission by setting up a prior act of bankruptcy. This was decided in *Donovan v. Duff* (a), where Lord Ellenborough C. J. notices that it had been so ruled by Lord Loughborough; and Lord Kenyon held the same in *Mercer v. Wise* (b). And this point, to a certain extent, was considered in *Rex v. Bullock* (c); for there evidence was given of a prior act of bankruptcy, though none was tendered of the existence of a debt on which a commission might have been issued; but Heath J. said if it had been tendered it would not have been received; and upon the petition of *Bullock* to supersede his commission, the Lord Chancellor, though he dismissed it on another ground, said that he had conversed with many of the Judges, and they thought that it was not competent for the bankrupt to avail himself of his prior act of bankruptcy. Upon the last replication the objection is, that *Stewart* ought to have relinquished his action before he petitioned for the commission; which objection is founded on a mistaken construction of the 49 G. 3. c. 121. s. 14.; for that clause only disables a creditor, who has brought an action against any bankrupt in respect of any demand which might have been proved under the commission, from *proving* under the commission, without relinquishing his action; but it

(a) 9 *East*, 21.(b) 3 *Esp. N. P. C.* 221.(c) 1 *Taunt.* 76.

speaks

speaks only of proving; which is very distinct from petitioning; the statute therefore does not apply.

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*Holroyd*, contra, admitted that the git of the first replication had been correctly stated on the other side, but he denied that the answer given to it, namely, that the statute was only directory, was sufficient; because this was not a mere objection of form to the affidavit, but of substance to the want of a good petitioning creditor's debt. To give validity to a commission, it must appear that there was a petitioning creditor's debt subsisting at the time of the act of bankruptcy (a), whereas here, if the simple contract debt was extinguished by the judgment, it is as if the debt had never existed; and so the affidavit is not founded in fact; and it cannot be referred to the judgment debt, because a subsequent act of bankruptcy will then be wanting. Therefore it is no answer to say that the statute is only directory. But *Ambrose v. Clenden* has been relied on; and it is true that in that case it was considered that though a bond had been given, the simple contract debt was still subsisting to support a commission; that case, however, affords this distinction, that the bond was the voluntary act of the party, and the creditor taking it might avoid the bond, and resort back to his prior debt; but here he cannot avoid the judgment which is awarded by the Court. Upon the second replication, instead of supporting it, he took an exception to the plea, (which exception he said was either good against this plea, or mutatis mutandis against the last, for one or other of them must be bad) viz.

(a) See *Doe v. Boulcott*, 2 Esp. N. P. C. 597.

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that it justified under stat. 1st instead of 2d Jac. 1. In the statute book it is written under the year secundo (vulgo primo), and although it appears that the parliament was begun and holden on the 19th of *March*, in the first year of the reign of the king, that was within a few days of the end of the first year, queen *Eliz.* having died on the 24th of *March* preceding; and it also appears that it was continued until the 7th of *July* 1604, and then prorogued until the 7th of *February* following; both which latter dates were clearly in the second year of the king. And as to the replication to the last plea, he contended, that if a party cannot prove his debt under a commission without relinquishing his action, he cannot ex consequenti sue out a commission upon his debt without doing the same. And he compared it to the case of a creditor who has taken his debtor in execution upon a judgment, who cannot afterwards sue out a commission on the same debt. (a)

*Abbott* in reply to the exception taken to the pleas, admitted that one of the two last pleas could not be sustained, but contended that the objection rather went to the last, because as it appeared that the parliament was begun in the first year of the king, and as there was nothing to denote the precise day on which the statute passed, whether before or after the adjournment or prorogation, the rule of law must apply that all enactments relate to the first day of holding the parliament; and therefore the statute was properly described as of the first year.

(a) See *Cobden v. Cunningham*, 8 T. R. 123.

The Court disposed of these several points as they occurred in the course of the argument. Upon the first, Lord *Ellenborough* C.J. said, that he did not find that Lord *Hardwicke's* judgment in *Ambrose v. Clendon* proceeded on any such distinction as that taken by *Holroyd*, but it was founded on this, that although the bond was an extinguishment with regard to the bankrupt himself, because it was a debt of a higher nature, yet, in the proceeding under a commission of bankruptcy, both debts were the same; or, in other words, in bankruptcy the creditors all come in *pari passu*. And he asked whether this was really and truly less a debt for money lent, because it had, to certain intents, been changed by the judgment. Still it might be for money lent, though for the better securing the money the creditor had obtained a judgment. Upon the second point, the Court agreed with *Donovan v. Duff* and the other cases; and Lord *Ellenborough* C.J. said that he should have thought it better if it had not been decided that proof of a prior act of bankruptcy should ever upset an existing commission; but if it were permitted to the bankrupt himself to use this means of doing it, the most remote act of bankruptcy and debt, for none but the bankrupt could avail himself of the statute of limitations, might be set up for this purpose, which would be highly mischievous; and *Bayley* J. observed, that a collusion between the bankrupt and any one creditor, might protect the bankrupt from any commission whatever. And *Dampier* J. added, that the ground on which it was originally decided, that a prior act of bankruptcy should upset an existing commission, namely, that the party who had committed it was no longer a trader, was very technical.

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nical. Upon the objection taken to the pleas, the Court agreed that the act of parliament related to the first day of the parliament, it not being otherwise provided in the act itself (*a*), and as that day appeared to be in the 1st year of the reign of king James, therefore the last plea was ill; and this made it unnecessary to consider of the exception taken to the replication to that plea.

Judgment for the Defendant on the two first replications, and for the Plaintiff on the last plea.

(a) See 4 Inst. 25.

Saturday,  
Nov. 13th.

### The KING against The Inhabitants of West CRAMORE.

Renting a certain number of lugs of land at so much per lug, for the purpose of planting potatoes, where the pauper agreed to take the land of the landlord ready ploughed and manured, and when he entered upon it, it was quite prepared, was held to be a renting of land of a yearly value, as it was increased by being ploughed and manured by the landlord, although when the pauper took it the ploughing and manuring was begun, but not finished.

ON appeal against an order of two justices for the removal of *William Norris*, his wife, and children, from the parish of *Monckton Deverell* in the county of *Wills*, to the parish of *West Cramore* in the county of *Somerset*, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court on the following case:

A settlement in the parish of *West Cramore* was proved by the respondents, subsequently to which the pauper rented a house at *Monckton Deverell*, of the value of 3*l.* per annum, and occupied and resided in it for four years. During one year of his tenancy, he rented of one *Rossiter* 136 lugs of land, at *Monckton Deverell*, at the rate of 9*d.* per lug, amounting to the

SUM

sum of 5*l.* 2*s.* for the purpose of planting potatoes. He also, at the same time, rented of one *Maish* 58 lugs, at *Hill Deverell*, an adjoining parish, at the same rate of 9*d.* per lug, amounting to 2*l.* 4*s.* 9*d.* These rentings together amounted to 10*l.* 6*s.* 9*d.* The pauper agreed to take the land of *Rossiter* ready ploughed and manured; and when he took it the ploughing and manuring was begun, but not finished, but when he entered upon it, it was quite prepared. At the time of planting, he followed *Rossiter* to plough, and planted the potatoes himself, which were afterwards covered in by the plough. The agreement with *Maish* was similar to that with *Rossiter*; and when the pauper took and entered *Maish's* land, it was ready ploughed and manured. The potatoes were planted in the same manner as before stated. The two pieces of land together, without being ploughed and manured, were worth about 2*l.* 8*s.* per annum, but being ploughed and manured were worth what the pauper paid for them. The pauper took the two pieces of land in the spring for hoe crop, and he planted the potatoes in *May*, and took the crop out in *November*.

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against  
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*Gaselee* and *Moore*, in support of the order of sessions, stated, that this case had been reserved before *Rex v. Ringwood* (a) was decided; but they attempted to distinguish it from that case, because there the land had been dug by the landlord before the letting; whereas here it is found that the ploughing and manuring was not completed when the pauper took the land of *Rossiter*. And they cited the words

(a) 1 M. &amp; S. 381.

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of *Le Blanc J.* in *Rex v. Ringwood*, “that the value of the tenement, increased by the labour bestowed upon it after the letting cannot be taken into the account.” And they said that this was nothing more than an agreement to take the land, and employ the landlord to improve its value. If instead of the landlord the pauper had employed labourers for that purpose, surely it would not have conferred a settlement.

LORD ELLENBOROUGH C. J. The pauper agreed to take a tenement, which should be of a certain value; and at the time when he entered on it, it was of that value; for the ploughing and manuring were then finished.

LE BLANC J. The distinction endeavoured to be made does not vary the case; and it does not appear that any precise sum was agreed to be paid for the labour. The observation alluded to from *Rex v. Ringwood* must be taken with reference to the case then before the Court, and to the context where it is found, rather than as a general observation or applicable to a case of this kind.

Order of Sessions quashed,

*Casberd* was to have opposed the order,

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The KING against The Inhabitants of RIB-  
CHESTER.

Saturday,  
Nov. 13th.

TWO justices by their order removed *Robert Salthouse*, his wife and children, from *Ribchester* to *Church*, both in the county of *Lancaster*. The sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case :

The pauper *R. Salthouse*, when of the age of 17 or thereabouts, was bound apprentice by indenture, dated the 2d of *November*, 1790, to Messrs. *Peel* and Co. block or calico print cutters, for the term of six years, *Peel* and Co. by the indenture, covenanting (amongst other things) to pay the pauper six shillings weekly during the term. These indentures were proved to have been executed by the pauper and his mother, but no evidence was given of their having been executed by *Peel* and Co. The pauper during the first two years of his term served *Peel* and Co., and slept in the town-ship of *Ribchester*. After the end of that period, he was sent by his masters to work for them in the town-ship of *Church*, and he accordingly worked in the works of his masters in *Church*, and slept there, except on *Saturday* and *Sunday* nights, when he went to sleep at his mother's in *Ribchester*, and returned on the *Monday*. Eleven other apprentices left the works at *Church* on *Saturday* and returned on *Monday*, which the masters, *Peel* and Co., knew, and it was the usual custom for the apprentices to do so. The pauper continued to work and sleep in this manner, for the term of two years longer, at the end of which time he entered into

Where an apprentice who worked and slept at his masters' works in *C.* at weekly wages, went with their knowledge on *Saturdays* and *Sundays* to *R.*, and slept there, and returned to his work on *Mondays*, and was received by them, and on the *Saturday* afternoon before *Shrove Tuesday* (having the night before slept at *C.*) received his pay and never returned again to the service, and slept that and the following night at *R.*, but on quitting the works on *Saturday* had not formed any intention not to return, nor had he on the *Sunday*, nor could he fix the time when he determined not to return: held that his settlement was at *C.*, his service having ended on his quitting on *Saturday*.

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an agreement with one *Walmsley* of *Ribchester*, for five meals in each week, for one shilling and eight-pence a week, and he accordingly went every *Saturday* night to *Walmsley's* house, in *Ribchester*, and returned to the works in *Church*, and slept there, except upon the *Saturday* and *Sunday* nights, as before. The pauper continued to reside and sleep in the manner last-mentioned for a quarter of a year, until the *Saturday* before *Shrove Tuesday* 1795, when he received his pay, and never returned again to the service of his masters; having on the night before this *Saturday* slept in the works at *Church*. The pauper, when asked whether when he quitted the works on the said *Saturday* he had determined not to return again, said that he could not say that he did determine not to return, but that it seemed he did not return. When asked whether on quitting Messrs. *Peeks'* works in *Church*, for the last time on the *Saturday* afternoon, he had formed any intention not to return, he answered that he had not — being asked the said question as to *Sunday*, he made the same answer; and further said that he could not fix upon any particular point of time when he determined not to return. The pauper slept at *Walmsley's*, in *Ribchester*, on the *Saturday* night, and for the whole of the succeeding week, and then hired himself into another employment.

*Holroyd* and *Starkie* in support of the order of sessions, contended that the pauper continued in the service under the indentures up to the *Monday* morning when he actually left it, or at least over the *Saturday* night, at which time he had not any intention of quitting it; and therefore his sleeping at *Ribchester* on

on the *Saturday* night was under the indentures, and entitled him to a settlement there. This, they said, was not like *Rex v. Smarden* (a) and *Rex v. Barmby* (b), a casual lodging of the apprentice at *Ribchester*, but was referable to the apprenticeship, because the case states that it was in the usual course and with the masters' knowledge for the apprentices to sleep away from the work on *Saturdays* and *Sundays*. And they compared it to the cases of *Rex v. Stratford-on-Avon* (c), *Rex v. Undermilbeck* (d), and *Rex v. Cusleton* (e), some of which shewed that a residence in another parish away from and without any work performed in that parish for the master, might yet be referred to the service with him, and gain a settlement there. Then, if the sleeping at *Ribchester* would be referable to the apprenticeship, unless the service under it was at an end, the question is when it was put an end to. As far as regards the masters, it certainly continued during the *Saturday* and *Sunday*; for it must be taken, from what the case states, that they would have received the pauper, had he returned on *Monday*. Then as to the pauper; his departure on the *Saturday* afternoon was an equivocal act, and if it had been accompanied with an intention to quit the service, perhaps it might have been argued that that intention having been afterwards executed, the subsequent quitting on the *Monday* should be referred to the original departure; though even there, as there was a locus poenitentiae till the *Monday*, it might have been hard so to refer it; but where the original departure was equivocal, and was unaccompanied with any such intention, nor, as far as appears

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(a) 13 East, 452.

(d) 5 T. R. 387.

(b) 7 East, 381.

(e) Burr. S. C. 569.

(c) 11 East, 176.

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by the case, was any such intention formed before the actual quitting on the *Monday*, it would be inverting the doctrine of relation to apply it to such a case.

Lord ELLENBOROUGH C. J. This is a case in which there was not any express leave of absence given by the masters, but they had been in the habit of receiving back their apprentices after they had gone home and returned, and by so receiving them they shewed that it was not their purpose to renounce them on that account. In pursuance of this indulgence the pauper went as usual on the *Saturday* night, and it does not appear what his intention was at that time, or that he had formed any upon the subject either of returning or staying away. He did not, however, return on the *Monday*; the end and conclusion, therefore, gives a character and denomination to the original act of departure; *finis nomen operi imponit*. From what was finally done we must collect what was his determination when he first went away on the *Saturday*. We find that he did not return, and that he did not on this occasion, as formerly, avail himself of the absence from *Saturday* to *Monday* as an indulgence. In *Rex v. Stratford-upon-Avon* the apprentice continued to perform a species of service with his master while he lodged with his mother, which was a circumstance to cover what might otherwise have been an interruption of the service; it was therefore held that he gained a settlement where he lodged. But here it appears that the apprentice, by not returning to his service on the *Monday*, had not left it on the *Saturday* under the usual indulgence; and therefore he must be considered as having broken the contract on the *Saturday* when

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he quitted his masters' works; and, consequently, *Friday* night was the last night of his residence as an apprentice. The settlement, therefore, was at *Church*, where he slept on that night, and not at *Ribchester*.

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LEBLANC J. There is one question which has very properly not been touched upon in the argument. It is stated that no evidence was given of the indentures having been executed by the master. But it appears that they were executed by the pauper, and that is binding. Upon the point made in argument, one cannot, perhaps, but lament that it should ever have been determined that an apprentice serving another person, with the leave of his original master, in another parish should gain a settlement in that parish. The Court, however, do not wish to disturb those cases. The question here is, whether there was any residence under the indentures of apprenticeship after the *Saturday*, when the pauper left his master's service, and never afterwards returned. Without being obliged to have recourse to any difficult inquiry into the operations of his mind, the necessity of doing which is much against the argument used, we have here one clear line of fact respecting this apprentice which cannot deceive, viz. that when he left the service on the *Saturday* he received his wages up to that time, and after that time he never received any more. It appears, therefore, that he was not in the service of his master after quitting his service on the *Saturday*.

BAYLEY J. I am of the same opinion. It is impossible to say that this apprentice was serving under the indentures of apprenticeship after the afternoon  
of



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of the *Saturday*, when he received his pay, and never afterwards returned. The Court cannot look to what was passing in the mind of the apprentice, but to his acts. From the nature of the service he was only employed locally at the manufactory during the ordinary working days: but from *Saturday* to *Monday* he was free from his master. If, then, he was to have that interval entirely to himself, and never returned after its expiration, at what time did he leave his masters' service? It must be taken that he left it at the time that interval commenced, for he was not in a condition to do any act of service for his master after the *Saturday* afternoon.

DAMPIER J. I am of the same opinion. The case of *Rex v. Undermilbeck*, cited in argument, is the only case like the present; but in that case the master recognized the departure of the servant: for he paid him his wages for the time of his absence. That therefore affords a distinction. Here the apprentice was at weekly wages, and was paid on the *Saturday*; and the *Friday* night was the last night of his being in the actual service of his masters under the indentures; and the only question is, whether there was a constructive service, which was to go on during the *Saturday* and *Sunday*. It seems to me, that the circumstance of the apprentice not having returned on the *Monday*, shews the time when the service determined, namely, on the *Saturday*, when he received his last wages; although, if he had returned, the masters by receiving him again would have recognised him as their apprentice during the period of his being absent.

Order of Sessions quashed.

*Scarlett* and *J. Williams* were against the order.

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## The KING against G. WILLIAMS.

Saturday,  
Nov. 13th.

**ABBOTT** moved for a rule nisi for an information in nature of quo warranto against the defendant, for exercising the office of mayor of the borough of *Carmarthen*. By charter of incorporation of the fourth year of the reign of his present majesty, reciting that the corporation was dissolved, it was granted and confirmed to the said borough by the name of the mayor, burgesses and commonalty, (inter alia) that there should be a mayor and 20 common council-men, with power to hold fortnight courts for the swearing in of burgesses &c., and that the mayor, burgesses and commonalty, should yearly on *Monday* next, after *Michaelmas* day, elect from among themselves a fit person to be mayor, and two others to be sheriffs &c., to be sworn before 12 burgesses to be appointed by the common-council; and that the *mayor &c. should be inhabitants and residents within the borough aforesaid, on pain of forfeiting such sums of money or amerciaments as should be imposed on them by the mayor, recorder, and major part of the common council-men, not exceeding 100l.* It was stated to be the invariable custom, to ring the market-place bell immediately before the holding of any corporate meeting, as well on the charter as on other days, in order to give notice of such meeting being about to be holden, but that it was not customary to ring the bell before the holding of the fortnight court; that on the charter day soon after the ringing of the bell, about 12 in the forenoon the mayor, burgesses and commonalty usually assembled in the hall, and after calling the fortnight court when

It is necessary that a presiding officer, who by the charter of a borough forms an integral part of an elective assembly, should be present up to the time when the election is completed, and the election cannot be proceeded in during his absence, although he should improperly absent himself.

A charter which requires that the mayor should be inhabitant resident within the borough *on pain of forfeiting such sum as should be imposed by the mayor, recorder, and major part of the common council, not exceeding 100l., does not require residency as a qualification for holding the office, but only under a penalty.*

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such happened to fall on that day, and swearing in the burgesses ordered to be admitted, proceeded immediately to the election and swearing in of the new mayor, &c.; and that it was not usual after adjourning the fortnight court to adjourn the corporate meeting to any other part of the day; that on the charter day 1812 the mayor was elected at a corporate meeting immediately succeeding the fortnight court. That on *Sunday* previous to the charter day 1813, the said mayor informed the town-clerk that he should hold the fortnight court at half past ten the next day, and the other at 11 o'clock. That the next morning at half past ten the bell was rung when the recorder and town-clerk with a large portion of the burgesses and commonalty assembled in the hall, and shortly after, the mayor came in and held the fortnight court, the business of which lasted until a quarter before one, when the mayor signified his intention of adjourning until three o'clock, and then returning to hold the corporate meeting for the election of the new mayor &c. according to the charter, to which several of the burgesses objected and protested against his leaving the assembly, and requested him to proceed in the business of the assembly, which the mayor, contrary to the advice of the recorder and the sense of the burgesses, refused; whereupon one *D. J. Edwardes* was immediately proposed by a burgess, and put in nomination as mayor for the year ensuing in the presence and hearing of the then mayor, and seconded by another burgess, and no other candidate being then proposed, was declared by the burgesses and commonalty duly elected; but the mayor, after *Edwardes* had been proposed and seconded, having left the hall, and the majority of the common council

council (being in the same interest with the mayor) not being assembled, nor present, no order or appointment was made of 12 burgesses to swear in *Edwardes*; that the mayor, when he so left the hall, did not make proclamation of adjournment or give public notice thereof; that when *Edwardes* was proposed and seconded, a large majority of the burgesses were in or about the hall, many of whom came from a great distance; that *Edwardes* then took the chair and presided at the assembly. That at three o'clock the old mayor, with the major part of the common council, returned to the hall and proceeded to the council room, and continued there until five o'clock, and whilst there, were requested to appoint 12 burgesses to swear in *Edwardes*, but refused so to do. That at five o'clock the old mayor, attended by several of the common council, came into court, at the assembly of the burgesses and commonalty, where *Edwardes* was presiding, and the old mayor proposed and nominated the defendant, who then resided, and now resides at a distance of 26 miles from the borough, to be mayor for the year ensuing, which was seconded by a common council-man; whereupon they were informed that *Edwardes* having been before duly elected, the defendant could not be legally elected in his room, and besides, that he was not a resident burgess as the charter required, and several burgesses protested against his nomination, but the old mayor persisted in proceeding to the election of the defendant, contrary to the advice of the recorder, and declared him duly elected, and he was accordingly sworn in, and acted and continues to act as mayor.

One objection now made upon these facts to the defendant's election was, that he was not resident within the borough,

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rough, but the Court disposed of that by remarking that the charter did not seem to require residency as a qualification but only under a penalty. Another objection was, that before the defendant was elected the office was full by a prior election of *Edwardes*; in support of which it was contended, that *Edwardes* had been duly nominated in the presence of the mayor at the charter court, of which the mayor had given notice himself, as well as by the ringing of the bell, and that he was afterwards declared by the burgesses to be duly elected; and although the mayor had at that time left the court, yet as the election had well commenced, and the mayor had no right to absent himself at that period of it, it was competent to the burgesses to proceed and complete it in his absence.

LORD ELLENBOROUGH C. J. How can it be contended, that this was an election made under the presidency of the mayor, whose functions were superseded by the burgesses. Supposing his absenting himself to be criminal, that will not render all that is done in his absence valid; otherwise it would come to this, that in every case where the mayor should absent himself improperly, a good election might be made in his absence.

DAMPIER J. The question is, whether this election took place at a meeting at which the mayor presided; and it is not stated, that he remained in the hall up to the time when the election was declared. In *Rex v. Buller (a)* it was considered as necessary for the mayor

(a) 8 East, 389.

to be present during the whole of the election until it was completed; and that for the want of his presence the election was void; the reason of which is, that where the presence of any party is required at an election, he must be personally present at the time when the election is declared.

*Per Curiam,*

Rule refused (a).

(a) See *R. v. Ellis*, 9 East, 252. n. and *Duke of Bedford's case*, ib. 253.

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### The KING against M. HOBSON.

Wednesday,  
Nov. 17th.

AN information was exhibited before a magistrate against the defendant on the stat. 2 Geo. 2. c. 26. s. 4. for rowing a skiff upon the *Thames* between *Gravesend* and *Windsor*, for hire and gain, contrary to that statute, and not being within any of the exceptions in the 11 & 12 W. 3. c. 21. The evidence in support of the charge was this, "that the defendant was seen by a witness on the *Thames* in a skiff rowing down the river, and towing some spars, and that he told the witness that he was employed by Messrs. *Brown* and *Arnold*, mast-makers, and that he was going to the ship *Stag* off the *Red House* at *Deptford*, to put the spars on board that ship for the said *B.* and *A.*, whose servant he was, and that he also told him that he was not a waterman. For the defendant, it appeared that he was a block-maker, and the servant of *B.* and *A.*, who paid him so much per week, and that on the day stated in the information their apprentice was sent to bore some holes on board the *Stag*, that one person could not bore the

A person who was the servant of *B.* and *A.*, mast-makers, at weekly wages, was not considered as liable to a penalty under the 2 G. 2. c. 26. s. 4. for rowing on the *Thames* not being qualified, &c. for hire and gain, by reason that he was in a skiff rowing and towing some articles of his masters' manufacture to a ship in the river, having been sent by them with their apprentice to assist him in some work on board the ship, and not being to receive any thing in addition to his wages for going thither or row-

ing the skiff to the ship; and therefore the Court quashed the conviction.

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holes, and that the defendant was sent with the apprentice in the boat, and that he (the defendant) was not to receive any thing extra or in addition to his weekly wages for going, rowing, or assisting to row the boat down to the *Stag*, and that the things which the apprentice and the defendant had with them were of *B.* and *A.*'s own manufacturing. The magistrate convicted the defendant, and adjudged a forfeiture of 10*l.* And now the conviction having been removed by certiorari into this court,

*The Attorney-General* and *Bolland* were called upon to support it, and they admitted that the question was, whether the defendant could be taken to have been rowing for hire and gain; and contended that under the circumstances he might; as in order to satisfy those words it was not necessary he should be expressly hired for the particular job, or be paid for it separately, but it was enough that he was found to be hired at weekly wages, and under that hiring engaged in this employment, for which he was not qualified. And in support of this construction they referred to the 11 & 12 *W. 3. c. 21.*, which recites the mischief arising from the unskilfulness of watermen, &c., and prohibits all such as are not duly qualified from rowing or plying on the *Thames* between certain limits. In like manner the 2 *G. 2. c. 26.* is directed to the same end, viz. that of keeping this business, which requires great skill and attention, in the hands of persons duly qualified, for the better preservation of the lives of themselves and other subjects; and the exception contained in the 8th section in favour of the owners of quays and others, proves the generality of the prohibition, for if it be necessary

cessary for the owners of quays who may use their own boats to employ watermen, the necessity of employing none but watermen applies à fortiori to other cases. The same danger would be likely to result from the unskilfulness of this defendant, whether he were paid for the particular job, or taken from his handicraft, for which he is paid weekly wages, to be employed in it; and he is in effect employed for hire and gain, if whilst he is employed his wages are still going on.

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LORD ELLENBOROUGH C. J. The argument pushed to this length would go to shew that the clerk or servant of any person in attendance upon the courts who should take a sculler and row to *Westminster* with his master's papers, would be a person within the statute. Such an act of the clerk or servant might be dangerous to his own as well as the navigation of others, but it would be difficult I conceive to shew that he would be thereby a person rowing for hire and gain.

DAMPIER J. It is not stated that this was done in the usual course of the defendant's business; and consistently with the statement it might have been the only time he had ever done it.

*Per Curiam,*

Conviction quashed.

*Gurney* was to have opposed the conviction, and he mentioned a MS. case of *Rex v. Taylor (a)*, in which he said the same point was decided.

We were favoured with this note by Mr. *Gurney*.

(a) *Rex v. Taylor*, *Easter Term*, 30 Geo. 3.

This was an information against the defendant for unlawfully causing his apprentice to row or work on the river *Thames* in the parish of St.

L. 2

*John,*



1813.

Wednesday,  
Nov. 17th.

JACKSON *against* YATE.

Affidavit to hold to bail, "that defendant is indebted to plaintiff in 450*l.* as indorsee of a promissory note made by defendant," without stating the date of the note, or that it was payable on demand, or that

**A**N affidavit to hold to bail made by the plaintiff stated, that the defendant was indebted to him in the sum of 450*l.* as indorsee of a promissory note made by the defendant, without stating the date of the note, or that it was payable on demand, or that it was due or payable at a day then past; for which defects *Comyn* obtained a rule nisi to discharge the defendant out of it was due or payable at a day then past, is insufficient.

*John, Wapping*, a certain boat called a skiff, for hire and gain, contrary to the statute. The evidence was, that the defendant, who was a mast and blockmaker at *Wapping*, had sent an apprentice in one of his boats from his yard at *Wapping* for the purpose of carrying a main cross tree top and tressel trees on board a ship lying at *Blackwall*. The defendant offered to prove that he did not receive any hire or gain whatsoever; but the magistrate not considering this evidence to be material, proceeded to convict the defendant in the penalty of 10*l.* The conviction having been removed, *Maryat* contended that the evidence was not sufficient to prove the offence; it did not appear to have been done for hire or gain. — *Erskine* contra. The magistrate who hears evidence on a summary proceeding, and who is to convict or acquit upon that evidence, may infer every thing which the evidence *prima facie* imports, unless evidence is adduced by the defendant to repel the inference. The justice had a right to presume that, when an act was done which by the ordinary course of navigation would entitle him to the payment of 2*s.*, the defendant received it. Supposing it was sending manufactures home, though it would not have been hire, it would be gain.

Lord KENYON C. J. That would be straining the construction of the statute far beyond its fair import. The informer must have a witness to fasten the fact. There is no evidence of hire or gain in the least.

GROSS J. agreed that justices should convict on the evidence, as a Judge would at *nisi prius*. Carrying for hire and gain is the offence. If this servant was carrying his master's property and not for hire or gain, he clearly is not liable. In penal proceedings we are not to presume.

Conviction quashed.

custody

custody on filing common bail, and cited *Mackenzie v. Mackenzie (a)*, and *Perks v. Severn (b)*.

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JACKSON  
against  
YATE.

*Storks*, who shewed cause, relied on *Davison v. March (c)*, where the affidavit to hold to bail upon a bill of exchange was held good, though it did not allege the bill to have become due, on the ground that the plaintiff might be indicted for perjury if the bill was not due, inasmuch as the defendant would not in that case be indebted to him.

But BAYLEY J. distinguished that case, because there the defendant was stated to be indorsee of the bill, and as such was only a collateral security, and could not be indebted unless the bill had become due, and had been dishonoured; but here the defendant being the maker of the note, the affidavit that he was indebted might be true, and yet the note might not be due at this time, because the maker of a promissory note becomes a debtor presently, though the note be payable at a future day. It is debitum in præsentì solvendum in futuro.

*Per Curiam,*

Rule absolute.

(a) 1 T. R. 716.

(b) 7 East, 194.

(c) 1 N. R. 157.

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Friday,  
Nov. 19th.

DRURY and Others, Executors of W. O'BRIEN  
DRURY, deceased, *against* Lady GARDNER  
and Others, Executors of Lord GARDNER.

Where the admiral commanding on the *Cork* station issued orders to the captain of a frigate on that station to go on a particular service, and afterwards to cruise within certain limits for six weeks, and the frigate after performing the service began her cruise, and returned with a prize to *Cork*, and afterwards the admiral being directed by the admiralty to take one of the frigates and proceed to *Plymouth* for further orders, and to direct another admiral to take the command, did accordingly direct another

admiral to take under his command the frigate, among others, and afterwards took himself the said frigate, and sailed in her to *Plymouth*, and was appointed commander of the Channel fleet, and issued an order to the captain of the frigate to cruise for a particular purpose for a week, and at the expiration of that time to proceed in execution of the former orders which he had received from him; and the frigate sailed from *Plymouth*, and afterwards arrived within the limits prescribed by the former orders (which were taken to be within the limits of the *Cork* station,) and made two captures, one within and another without those limits: held that the admiral so appointed and commanding on the *Cork* station at the time of the captures was entitled to the flag 8th of that which was captured within the limits, not as being privy to the former orders (which orders were not suspended by the last order, and again subsisting at the time of the capture, but were expired by efflux of time,) but as admiral of the station within the limits of which the said frigate had made the capture.

and

ASSUMPSIT for money had and received by the defendants' testator to the use of the plaintiffs' testator. At the trial before Lord *Ellenborough* C.J., at the London sittings after last *Hilary* term, a verdict was found for the plaintiff for 196*l.* 17*s.* subject to the opinion of the Court upon the following case:

On the 21st of *January* 1805, Admiral Lord *Gardner* was commander under the orders of the Lords Commissioners of the Admiralty, dated the 8th and 20th of *June* 1803, of the ships and vessels employed upon the *Cork* station, of which the *Topaze* frigate was one, and Rear Admiral *Drury* was serving under him, in pursuance of an order of the Admiralty, dated the 13th of *December* 1804. On the said 21st of *January*, Lord *Gardner* issued orders to Captain *Lake* of the *Topaze* to take under his convoy a *Spanish* ship, which had been detained, and proceed with her off *Plymouth*, and having seen her in safety in that port; to proceed and cruise between 48° and 52° N. latitude, and 10°

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 DRURY  
*against*  
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and 20° W. longitude, for the protection of the trade of his majesty's subjects, and the annoyance of the enemy, and for certain other purposes mentioned in the order; and the order proceeded thus: "and in the event of your falling in with or obtaining any certain intelligence of the enemy's fleet having put to sea from Brest or any other port, you are to act agreeably to orders of the 20th of *June* last, but in case you should not fall in with the enemy's fleet, or gain any important intelligence which you may judge necessary for immediate information, *you are to continue on this service for the space of six weeks from your arrival on your station*, and at the expiration thereof you are to return to this harbour for farther orders." The *Topaze* sailed under this order from *Cork* harbour on the 26th of *January* with the *Spanish* ship under her convoy, and having seen her safe into Plymouth, sailed from thence on the 11th of *February*, and in her return to *Cork*, in 48° 27' N. 15° 21' W., made a capture (about which there was no question,) and arrived in *Cork* harbour on the 22d of *February*. On the 25th an order was issued to Lord Gardner by the Admiralty, directing him to shift his flag to one of the frigates under his command, then at *Cork*, and proceed in her to Plymouth, and remain there till farther orders, and to direct Rear Admiral Drury to shift his flag, and take under his command the ships and vessels under his (Lord Gardner's) orders, leaving with him all unexecuted orders, and giving him such instructions as might be necessary for his guidance. In pursuance of this order Lord Gardner on the 5th of *March* issued directions to Rear Admiral Drury to take under his command the ships and vessels named in the margin of those directions, amongst which was

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Drury  
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the *Topaze*, informing him that there would be delivered to him a packet containing all unexecuted orders, letters, and papers which he (Lord G.) had received for his government, &c. On the 15th of *March* Lord Gardner and suite sailed in the *Topaze* from *Cork* harbour for *Plymouth*, and arrived thither and landed on the 17th. On the 20th, the Lords Commissioners of the Admiralty appointed Lord Gardner to the command of the Channel fleet, and his Lordship on the 30th gave the following order to Captain *Lake*: "The Lords Commissioners of the Admiralty having transmitted to me a copy of a letter they received from the masters of *Lloyd's* Coffee-house respecting the unprotected state of the homeward-bound convoy from *Surinam*, you are hereby required and directed, in obedience to their Lordships' directions, to proceed to sea, and cruise for one week to the westward for the protection of the said convoy, and at the expiration of that time it is their Lordships' directions that you proceed in execution of the former orders which you have received from me, and at the expiration thereof you are to return to your former station at *Cork*, and follow the orders of Rear Admiral *Drury*." The *Topaze* sailed on the 1st of *April*, and on the 21st arrived in 48° 58' N. 11° 5' W. On the 8th of *May*, in 49° 36' N. 12° 43' W., she captured the *Napoleon*, Spanish privateer, and on the 20th, in 50° 13' N. 21° 47' W. (not within the limits prescribed by the orders of the 21st of *January*,) she captured, after chase, the *Phoenix*, Spanish privateer, and on the 7th of *June* came to anchor in *Cork* harbour. Rear Admiral *Drury*, from the date of the order given to him by Lord Gardner, continued at *Cork* harbour under that order until after the return of the *Topaze*

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to *Cork*, and during that time Lord *Gardner* continued in the command of the Channel fleet, under the foregoing order from the Admiralty of the 20th *March* 1805. Lord *Gardner* in his lifetime, under and by virtue of the king's proclamation hereinafter mentioned, received, as the commander in chief's share of the flag proportions of the produce of the said prizes which were duly condemned, the sum of 196*l.* 17*s.* By his majesty's proclamation, issued on the 31st of *January* 1805, for the distribution of prizes, his majesty (amongst other things) ordered and directed that the captain or captains of any ships or vessels who should be actually on board at the time of taking any prize, should have 3-8th parts; but in case any prize should be taken by any ships or vessels under the command of a flag or flags, the flag officer or officers being actually on board, or directing and assisting in the capture should have one of the 3-8th parts. And it was directed that the following regulations (amongst others which do not apply to this case) should be observed concerning the 1-8th granted to the flag officer or officers who should actually be on board at the taking of any prize, or should be directing or assisting therein, 1st, That a captain of a ship should be deemed to be under the command of a flag when he should actually have received some order directly from, or be acting in execution of some order issued by a flag officer, and should be deemed to continue under the command of such flag so long as the flag officer by whom the order was issued, or any other flag officer acting upon the same station should continue upon such station, or until such captain should have received some order directly from, or be acting in execution of some order issued

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issued by some other flag officer or the Lords Commissioners of the Admiralty. 2dly, That a flag officer, commander in chief, when there is but one flag officer upon service, should have to his own use the said 1-8th part of the prizes taken by ships and vessels under his command. 6thly, That a chief flag officer quitting a station either to return home or to assume another command, or otherwise, except upon some particular urgent service with the intention of returning to the station as soon as such service is performed, should have no share of prizes taken by the ships or vessels left behind, after he should have passed the limits of the station, or after he should have surrendered the command to another flag officer, appointed by the Admiralty to be commander in chief upon such station. 10thly, That when more flag officers than one serve together, the 8th part of the prizes taken by any ship or vessel of the fleet or squadron should be divided in the following proportions, viz. if there be but two flag officers, the chief should have 2-3rd parts of the said 1-8th, and the other should have the remaining 3d part, &c.

The question for the opinion of the Court is, whether, under the above circumstances, Rear Admiral *Drury* was entitled to the flag 8th of the aforesaid prizes, or either of them, or to any part of such 8th. If the Court should be of opinion that he was entitled to such 8th, the verdict is to stand; and if the Court should be of opinion that he was entitled to the 8th of one of the said prizes only, the verdict to be reduced to a sum equivalent to the said 8th; and if the Court should be of opinion that he was entitled to a part of the said flag 8th, the verdict to be reduced to a sum equivalent to

such part: but if the Court should be of opinion that he was not entitled to any part, then the verdict to be set aside and a nonsuit entered.

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*Gifford* for the plaintiffs, stated the question to be, whether the plaintiffs, as the representatives of Admiral *Drury*, were entitled to a flag 8th of both or either of the prizes; and he contended that they were entitled to a flag 8th of both. He said that the result of the documents relating to the cessation of Lord *Gardner's* command on the *Cork* station, and the appointment of Admiral *Drury* to it, would probably not be denied to be this, that as soon as Lord *Gardner* received the order from the Admiralty to shift his flag and quit the station, and gave directions to Admiral *Drury* to take upon him the command of the ships on that station, he (Lord G.) ceased to be the commander, and Admiral *Drury* became such. He also said that it was clear by the 6th article of the prize proclamation, that the chief flag officer quitting a station was not entitled to any share of the prizes taken after he has passed the limits of that station. On the 5th of *March* therefore Lord *Gardner* ceased to have the command on the *Cork* station, and he also ceased to have any claim to a share of the prizes taken by the ships on that station after he had passed its limits; and Admiral *Drury* became entitled to a share of all prizes taken by the ships on that station, notwithstanding those ships might be acting under orders not issued by himself but by his predecessor. This was so decided in *Lord Nelson v. Tucker* (a), since which the 6th article of the proclamation has been

(a) 4 East, 238. See also *Ld. Keith v. Pringle*, ib. 262.

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framed in the spirit of that decision. Admiral *Drury* ~~there~~ would be entitled to the flag 8th of the prizes taken by the *Topaze*, which was transferred with the rest of the ships to his command, and after performing the particular service of carrying Lord G. to *Plymouth*, returned to and was in the execution of her former orders when the prizes were made, unless it can be shewn that the order afterwards issued on the 30th of *March* by Lord G. at *Plymouth* was such an interruption of the former orders as to make an excepted case in favour of Lord G.'s claim. And this brings it to a question upon the effect of that subsequent order. It is submitted that its effect was not to annul the previous orders, but was, in the language of Sir *Wm. Scott* (a), confirmatory of and coincident with those orders, operating only at the utmost as a suspension of them for the time the *Topaze* was directed to cruise; which time had elapsed, and she had returned to her former orders when the captures were made. The order was to cruise for *one week*, and then to proceed in execution of the former orders; and it appears that the *Topaze* sailed on the 1st of *April*, and did not make the captures until after the 21st, when she had got within the limits prescribed by the former orders, and was in the execution of them. And this mainly distinguishes the case from that of the *Orion* (b), decided by Sir *Wm. Scott*, and afterwards confirmed upon appeal; because the ground of that decision was, that the captures were made under the orders of the admiralty, not confirmatory of nor coincident with the orders of the admiral, but suspending and annulling those orders for the time, and producing captures which

(a) 4 *Rob. Adm. Cas.* 38c.(b) 4 *Rob. Adm. Cas.* 38c.

would

would not otherwise have taken place. And Lord Ellenborough, in commenting on that case in *Harvey v. Cooke* (a), said, "The ground of our decision was, that there was a new departure, as it were, from the captain's original command by the special and paramount order of the Admiralty, appointing a certain deviation from his original orders, after which he was to return again under the command of the admiral: and the prize happened to be taken during the deviation." But in *Lady Gardner v. Lane* (b), which was more like the present case, the Court held that a partial modification of former orders by a subsequent order issued by the commander upon another station, did not supersede those orders, or entitle the commander issuing such subsequent order to a share of prizes taken by a ship acting under the modified orders, in derogation of the rights of another commander. And it may be observed that this is a case less favourable to such a claim than that was, because here the subsequent order having been executed, the ship was completely remitted to her original orders. As to one of the prizes which was captured a little without the limits of the first orders, in answer to an inquiry from the Court whether it could not be ascertained if the chase began within the limits, he said that search had been made in the log-book, but that it did not appear by that, and the captain was out of the kingdom; but he contended that as the capture was near upon the limits, and as it was stated to have been made after chase, it was most probable that the chase was begun within the limits, which the Court would rather presume, than that the captain was guilty of a breach of orders.

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(a) 6 East, 232.

(b) 13 East, 574.

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*Horner*, contra, admitted that the question turned on the order of the 30th of *March*, and also that if Admiral *Drury* could be considered as privy to the former orders of Lord G. subsisting at the time when the captures were made, he would be as well entitled as if he had issued those orders himself; but he did not accede to that which was stated on the other side to be the result of the documents, as to the time of Lord G.'s ceasing to be commander on the *Cork* station. On the contrary he contended, that his leaving that station on the 5th of *March* in consequence of the order from the Admiralty, which was a very general one, was not to be deemed an entire relinquishment of the command, but only a leaving it upon a particular urgent service within the exception of the 6th article of the proclamation; for he left it for the purpose as directed by the order from the Admiralty of proceeding to *Plymouth*, and there awaiting farther orders. It is true that he afterwards received an order to assume the command of the Channel fleet; and from that time is to be dated the final ceasing of his, and the assumption of Admiral *Drury's* command on the *Cork* station. Again, he said it was not to be taken for granted that because the *Topaze* was named among the ships which Admiral *Drury* was to take under his command, that she was therefore, in the language of the 6th article of the proclamation, one of the ships or vessels left behind on the *Cork* station; on the contrary, she was taken from it by Lord *Gardner*, who had permission to take her, and was under his own immediate command; and so it appears she continued on the 30th of *March*; for on that day Lord G. issued a fresh order to her. Now that order imports by its language to have been issued in pursuance of immediate directions

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directions and authority from the Admiralty; and if so, the frigate must be taken to have been acting under it up to the time of making the captures, and never to have come under the command of Admiral *Drury* until she finally anchored in *Cork* harbour on the 7th of *June*; and in that case Lord G. would be entitled to the flag 8th of the prizes. But supposing Lord G. to have issued that order without authority, it would then be a void order, and therefore could not operate as a suspension of his former orders of the 21st of *January*, which it is said devolved on Admiral *Drury*, and if it did not suspend them, then the former orders being limited to six weeks would have expired, and there would not be any order subsisting at the time when the captures were made, to which Admiral *Drury* could be considered as being privy. And although upon this supposition Lord G. would not be entitled to the flag 8th, still the argument would be good against the right of Admiral *Drury*, which is the question here. Perhaps neither the one nor the other will be found to be entitled, but a party who is a stranger to this suit. As to one of the prizes it is submitted, that at all events Admiral *Drury* cannot be entitled to any share, inasmuch as it was not taken, nor is it stated that the chase was begun within the limits of the *Cork* station, and there is not any necessary presumption arising from what is stated, that it must have been begun within those limits.

*Gifford*, in reply, said that it was material in determining whether the last order was confirmatory of the former orders, to observe that it directed the captain to cruise to the westward, and then to proceed in execution of the former orders, which was a service not of a  
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kind to carry the frigate out of the direction, or in a contrary direction to that in which the original service would have engaged her, and therefore not to be deemed a separate service; but if the cruising did or might probably carry her elsewhere, so far it might be deemed *pro tempore* to lay the original authority to sleep. Such were the distinctions laid down by Sir *W. Scott* (a). But if Lord G.'s last order be void for want of authority, (and no authority for it is stated in the case) the above observations become immaterial, because the order itself of course falls to the ground. But then it is said the former orders will have expired; but that is not so, because the particular service of carrying Lord G. to *Plymouth* was an exception out of them. And it is submitted that whether those orders were expired or not, one of these prizes being captured by this frigate within the limits of the *Cork* station, the admiral commanding on that station at the time, is at all events entitled to the flag 8th of such prize.

LORD ELLENBOROUGH C. J. As to one of the prizes there is not any question, neither one party nor the other is entitled. The plaintiffs must recover on the strength of their own title, and are intitled only in respect of the privity of Admiral *Drury* with the capture, which privity was only coextensive with the limits of his station, and there was not any privity as to one prize unless the chase was begun within those limits, which does not appear. The question therefore turns on the one prize captured within the limits of the station. As to that, it appears that Lord *Gardner* had

(a) 4 Rob. Adm. Cas. 373. *Orion*.

been commander on the *Cork* station under orders from the Admiralty, and in that capacity had issued his orders to the captain of the *Topaze* to proceed to *Plymouth* on a special service, and having executed that service to cruise for certain purposes; which cruise was to continue for the space of six weeks from his arrival on the station; and it appears that the captain of the *Topaze*, afterwards in pursuance of those orders did arrive on that station, and therefore the period of his cruise had begun to run. This period had expired by efflux of time before the capture was made, and therefore Lord G. could not have any claim in respect of any privity with those orders. But it has been said that Lord G. might have, supposing in issuing his second order to the captain of the *Topaze* he was acting under some fresh directions from the Admiralty; and there seems to be an assertion of that sort in his order, but no such directions are stated upon the case, and we cannot here act upon his assertion that he had such. If there were not any fresh directions from the Admiralty, then all the authority that appears on the case, was an authority to take the frigate to *Plymouth*. When the frigate had conveyed him thither he had no farther control or authority over her, she was to return within the limits of the station; and he had no right to institute a new cruise or adopt a new adventure. If then Lord G. had not any right, the question is whether Admiral *Drury* had any. The plaintiffs must recover on their own strength; for it is not enough for them to shew that the defendants are not entitled to retain. It seems then that as to any privity with the orders, Admiral *Drury* has no right, because the period of those orders had elapsed by efflux of time; but by succeeding

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to the command he had incidentally as belonging to the command a right to share in captures made by this ship within the station, and one of the prizes was taken within the station. Therefore on that ground the plaintiffs are entitled to recover.

**LE BLANC J.** I agree with my Lord, that the plaintiffs are entitled to recover in respect of one of the captured vessels. The case does not contain all the facts one could have wished, but I dare say that is owing, as it has been stated to be, to the difficulty of procuring the necessary information. The case does not even state that the capture was made within the station belonging to Admiral *Drury*; and we must collect that as well as we can from the statement. And I cannot help thinking that there must have been some particular orders from the Admiralty under which this frigate was afterwards dispatched from *Plymouth* by Lord *Gardner*. As the case now stands, Lord *Gardner* whilst in command on the *Cork* station, issues orders to the captain of the *Topaze* to take a *Spanish* ship to *Plymouth*, and afterwards to cruise within a certain latitude for a limited time. Within that time and latitude, the frigate captured her first prize and returned with her to *Cork*. Afterwards Lord *Gardner* is empowered by the Admiralty to take the frigate to *Plymouth*; but it does not appear that she was under his orders for any other purpose than that of conveying him to *Plymouth*. When the frigate had conveyed him to *Plymouth*, his Lordship, whether with the authority of the Admiralty or as commander of the Channel fleet it does not appear, issued orders for her to go on a particular service, and after having performed that service, to proceed in execution of

of her former orders, that is, to return and cruise on the *Cork* station, and then to return to her former station at *Cork*. I apprehend that Lord *Gardner* at that time had not any right to issue orders to a frigate to cruise within the limits of another station; and this vessel was captured within the limits of that station after receiving such orders. I think the true way of considering it is this, that his Lordship was only empowered to use on a particular service the frigate then acting under unexpired orders, but that he engrafted on that service another service, which having performed the frigate was to return. During that return the capture was made within the *Cork* station, and therefore the representatives of Admiral *Drury* are entitled to that part.

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BAYLEY J. I am of the same opinion. The frigate was under the command of the *Cork* station, she was therefore under a flag officer, and some person must be entitled to the flag 8th of the prizes captured within the limits of the station. On the 5th of *March* Lord *Gardner* transferred the command of the ships on that station (among which was the *Topaze*) to Admiral *Drury*; but as a temporary purpose was to be executed by one of them, that is, to convey Lord *Gardner* to *Plymouth*, the *Topaze* was selected for that purpose. That was a particular service; and it does not appear that the Admiralty had given any other orders to take her out of the command of the *Cork* station. It seems to me then, that when that particular service was performed, she was bound to return to her station. She does afterwards return, and during her return she captures the prize in question within the limits of her station. It



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seems clear therefore that some person is entitled to a flag 8th, and that Lord *Gardner* is not that person. And no person can be entitled except the person who had the command at that time on the *Cork* station. I entirely agree on the other point, that the period of time had elapsed, and that this claim cannot be supported on the original orders for six weeks.

DAMPIER J. It is clear with respect to the original orders that the time had expired; and that the subsequent order of Lord *Gardner* could have no effect as it regarded the *Cork* station, because his Lordship was at that time the commander of the channel fleet. The *Topaze* originally belonged to the *Cork* station, and was taken out of that station upon a special service, which having performed, it was her duty to return to her station, and become part of the force employed on it. I do not consider Admiral *Drury* as deriving any authority from the order issued by Lord *Gardner* on the 30th of *March*; but consider this as the case of a frigate returning to her station, and making a prize within the limits of that station. When she took this prize she had become subject to the control, and was under the command of the admiral on the *Cork* station; and therefore a flag 8th properly belonged to him.

Verdict to be entered for 1-8th of one prize.

Lord ELLENBOROUGH C. J. noticed that the case had been extremely well argued, very succinctly, and very distinctly.

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DOE, on the Demise of CALKIN and Others, *Friday, Nov. 19th*  
*against TOMKINSON and Others.*

**EJECTMENT** brought on the joint demise of *S. Calkin* and *Jane* his wife, *J. M'Cormac* and *Anne* his wife, and *J. Cartlich* and *Sarah* his wife, for a messuage and land in the parish of *Dilhorn* in the county of *Stafford*. Plea, not guilty. At the trial at the *Stafford Lent* assizes 1813 a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

Devise of all his real and personal estate wheresoever and whatsoever equally to his sisters *M.* and *E.*, or to the survivor of them, and to be disposed of by the survivor as she may by will devise: held that the sisters did not take as tenants in common in fee; nor supposing them to be tenants in common for life with a contingent remainder in fee to the survivor, or with a power to the survivor to dispose of the fee by will, was it such a contingent remainder as was devisable by a will made by one in the lifetime of both the sisters, or was the power well executed by such will.

On the 7th of *Sept.* 1802 *John Tomkinson* being seised in fee of the premises in question, by his will, after directing his debts and funeral expences to be paid, devised thus: "My will and desire is, that all my real and personal estate wheresoever and whatsoever be left equally to my sisters *Mary* and *Elizabeth Tomkinson* of *Forsbrooke*, or to the survivor of them, and to be disposed of by her the survivor as she may by will devise," and made his said sisters his executrices. The testator died in 1810, leaving the said *Mary* and *Elizabeth* (who thereupon took possession of the estate) and also another sister *Anne* him surviving. Afterwards, on the 9th of *July* 1810, *Mary* made her will, and thereby devised all her messuages, lands, tenements, hereditaments, and real estates whatsoever, situate at *Forsbrooke* or elsewhere in the county of *Stafford*, to her sisters *Elizabeth* and *Anne* successively for life, and from and after the decease of the survivor of them, she devised all such part of her real estate which was devised to her by

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the will of her late brother *J. Tomkinson* to the defendants, their heirs and assigns, as tenants in common, and not as joint tenants. *Elizabeth Tomkinson* was living at the time when *Mary* made this will. *Mary* survived both *E.* and *A. Tomkinson*, but died without having republished her will. The lessors of the plaintiff, *Jane*, *Anne*, and *Sarah*, are the heirs at law of *Mary*, and also of *John*, *Elizabeth*, and *Anne Tomkinson*.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover; if the Court shall be of opinion that he is entitled, the verdict is to stand; if not, a nonsuit is to be entered.

*Abbott* for the plaintiff, after premising that the question, how far the will of *M. Tomkinson* was operative on the premises in question, or whether it was not wholly inoperative, would depend on the construction of the will of *J. Tomkinson*, contended 1st, that if the two sisters *M.* and *E. Tomkinson* took as joint-tenants in fee under that will, then the will of *M. Tomkinson* would be wholly inoperative, because, according to the case of *Swift v. Roberts* (a), a will made by a joint-tenant during the continuance of the jointure is not good under the statutes of wills, 32, and 34 and 35 H. 8. But, 2dly, if on account of this being a devise "equally" to his sisters, it should be held not to make a joint-tenancy between them, according to *Denn v. Gasken* (b), then he contended that they would take either as tenants in common for life, with a contingent remainder to the survivor in fee, or with a power to the survivor to dispose of the fee by will. But upon either of those constructions the will of *M. Tomkinson* would

(a) 3 Burr. 1488.

(b) Cowp. 657.

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be equally inoperative. First, supposing it a contingent remainder to the survivor, *M. Tomkinson* would then, at the time of making her will, have had no estate to devise, because it was not that sort of contingent remainder which is devisable. A possibility indeed coupled with such an interest as is descendible, is devisable; and if this would have descended to the heir of *M. Tomkinson*, if she had died before the event on which the vesting of the contingent interest depended, then the devise would be good; but how could that be in this case where the person to whom the contingent interest was directed, was not in any degree ascertainable before the event happened, for it was to depend on the event of one sister surviving the other? And so this case differs from *Selwyn v. Selwyn* (a), and *Jones v. Roe* (b), where the contingent interests would have been descendible. And therefore in *Roe v. Griffiths* (c) Lord Mansfield said, that in *Selwyn v. Selwyn* he was prepared to have shewn, with the concurrence of all his brethren, that in all contingent, springing, and executory uses, where the person who is to take is certain, so that the same may be descendible, they are also devisable; which sentence seems to be an exposition of the whole law upon this subject. And it will not be found that there are any decisions to reach those cases where the contingent interest is not descendible from any one dying before it becomes vested. Secondly, supposing it a power to the survivor to dispose of the fee by will, (though it is difficult to conceive that such a supposition can be correct, because in that case a moiety of the estate would be undisposed of during the interval between the deaths of the two sisters, which it is clear

(a) 7 Burr. 1131. (b) 3 T. R. 88. S. C. 1 H. Bl. 30. (c) 1 Bl. R. 606.

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the testator did not intend) but taking it to be so, then it is submitted that the power could only be exercised by a person who was the survivor at the time of exercising it. No precise case upon this point has been found, but it is submitted, by analogy to other cases upon powers, that the person who exercises it must at the time fill the character in which he exercises it.

*Peake*, contra, admitted that if the sisters took as joint-tenants, the will of *M. Tomkinson* would be wholly inoperative, but he contended that according to the rule observed in the construction of wills, the estate given to them by the will of *J. Tomkinson* was not a joint tenancy. The rule is, that in a will words which import an equal division, shall not be defeated by subsequent words importing survivorship, so as to make that a joint-tenancy which before was a tenancy in common; because in that case, the Court will rather refer the words of survivorship to an intention of preventing a lapse in the lifetime of the testator. So it was considered in *Lord Bindon v. E. of Suffolk* (a); and although that decree was afterwards reversed (b), it has been upheld by subsequent cases, *Rose v. Hill* (c), *Roebuck v. Dean* (d), *Russell v. Long* (e), and *Garland v. Thomas* (f). It is true that in some of those cases the words "as tenants in common" were added; in others however they were not; and in *Stones v. Hearteley* (g), there were no such words; but "equally to be divided" was holden to be a tenancy in common, although it was given to the survivor. So here, by reason of the word "equally" the words of survivorship shall be referred to the

(a) 1 P. Wms. 96. (b) 1 Bro. P. C. 189. (c) 3 Burr. 1881.

(d) 2 Ves. jun. 265. (e) 4 Ves. 551. (f) 1 N. R. 82.

(g) Cited 3 Burr. 1886. See also *Blissett v. Cranwell*, Salk. 226.

death of either of the sisters in the life of the testator, and then they will take not as joint-tenants but as tenants in common in fee, and so the defendants, as the devisees under the will of *M. Tomkinson*, will be entitled to a moiety. But supposing that construction not to be adopted, but that this is, as it has been argued, a contingent remainder in fee to the survivor, or a power to the survivor to dispose of the whole by will, it is submitted that in either case the whole passed by the will of *M. Tomkinson*. As to the first, it is not necessary that the testatrix should be seised of the contingent interest at the date of her will. Lord *Kenyon* in *Jones v. Roe* observed, that the statute of wills which enabled persons *having* any manors, lands, &c. to devise, must mean *having an interest* in the lands; and that a possibility coupled with an interest was deviseable. It is urged that it must be also such as is descendible; but though that quality has been noticed in the different cases as an inherent quality, it has not been determined to be an essential one. In *Selwyn v. Selwyn* it is observable that the son at the time of making his will had a mere contingent executory use to arise out of the subsequent recovery, which did not amount to more than a possibility. Lastly, considering this as a power to the survivor to dispose of the whole, it has been well executed. In the *Countess of Sutherland v. Northmore (a)*, a power was given by a settlement to a married woman *in case of the death of her husband in her lifetime*, to charge the estate with a sum of money, and she executed the power in the lifetime of her husband, and afterwards survived

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(a) 1 *Dick.* 56. S. C. 3 *Fin. Abr.* 427. pl. 8., by the name of *Sclater v. Travell*.

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him; it was determined by this Court, and afterwards by the Court of Chancery, that the power was well executed.

Lord ELLENBOROUGH C. J. It may be somewhat difficult upon a will framed like this to say what the estate given by it is; but, it is not equally so to say what it is not. If it be not a tenancy in common in fee, it is clear that the defendants are not entitled to any part, under the will of *M. Tomkinson*. Now to put this construction on the will of *J. Tomkinson* would defeat the intention of the testator, because his intention was to give the whole to the survivor. But then it is said, that this is a contingent remainder to the survivor and such as is deviseable; but supposing it to be a contingent remainder, I think it cannot be considered as deviseable, because the person who is to take is not in any degree ascertainable before the contingency happens; it cannot be said in whom the interest is during the lives of the two sisters, nor consequently that it is in either of them during that period; and it is only in the event of survivorship that it becomes certain. Admitting therefore the enlarged construction put on the statute of wills by Lord *Kenyon* and the other Judges in *Roe v. Jones*, how can a person be said to *have* a contingent interest, when it is uncertain whether he is the person who will be entitled to have it or not. And as to the case cited from *Viner* to shew that if this be a power to the survivor it has been well executed, the distinction between that case and the present is, that there the power was given to a designated person to be executed upon a contingency; here it is given to a contingent person. Therefore without determining what the precise estate given

given is, it appears to me sufficient to say that the defendants are not entitled.

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LE BLANC J. The defendants must support their case by shewing that this was a tenancy in common in fee, or such a contingent interest as was deviseable by *M. Tomkinson*. On reading the words of the will, I think it is impossible to say that it is the first, without rejecting material words. The words are, "that all my real and personal estate be left equally to my sisters *Mary* and *Elizabeth*, or to the survivor, and to be disposed of by the survivor as she may by will devise." In order to construe this to be a tenancy in common, it would be necessary to strike out the words "to the survivor, and to be disposed of by the survivor," which are inconsistent with a tenancy in common, and thus to take away from the survivor the power of disposing of it. But as it is impossible to reject such material words, so we cannot intend that the deviser meant to give a tenancy in common in fee. Upon a will framed like this I should perhaps feel great difficulties in determining what precise estate was given, but I think it is quite clear, that we cannot put that construction on it, which would reject material words.

DAMPIER J. In *Selwyn v. Selwyn* the person who was to take was apparent, there was therefore persona designata; and so it is evident Lord *Mansfield* considered from what he said of that case in *Roe v. Griffiths*. I am not aware of any decision which reaches a case where the person is uncertain.

*Per Curiam,*

Judgment for the Plaintiff,



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Tuesday,  
Nov. 23d.

### HUGHES against CHITTY and PONTLAND.

On a joint plea of not guilty to trespass and assault, if one defendant be found guilty, with 1s. damages and 1s. costs, and the other acquitted, the latter is only entitled to 40s. costs.

**TRESPASS** and assault. Plea not guilty, and *Chitty* was found guilty with 1s. damages, and 1s. costs; and *Pontland* was acquitted. The Master, upon taxation of costs, allowed *Pontland* only 40s.

*Park* moved that the Master might review his taxation, upon an affidavit, which stated that *Pontland's* costs were very considerable.

But the Court refused the rule. *Le Blanc J.* and *Dampier J.* observing that if the defendants had pleaded separately it might have been different, but as they had pleaded jointly it would be making the plaintiff pay the costs of the other defendant to allow increased costs to this defendant. (a)

(a) See *Thrustout d. Jenkinson v. Woodyear* and others, *Barnes*, 131.

Tuesday,  
Nov. 23d.

### BOEHM and Another against COMBE.

Declaration on a policy of assurance on goods at and from *L.* by land carriage to *H.*, and at and from thence by a packet to *G.*, beginning the adventure on the goods from the loading on board the ship, and averred that the goods were delivered at *L.* to carriers to be carried from *L.* by land carriage to *H.*, and by the fraud and negligence of the servants and persons employed by the carriers were wholly lost: held that this was a loss within the meaning of the policy, which was the usual printed form of marine policy, containing the usual printed enumeration of risks; and that it was not necessary to aver that the goods were loaded at *L.* to be carried to *H.*

**DECLARATION.** The second count stated that the plaintiffs caused to be made a policy of assurance upon goods lost or not lost, at and from *London* by land carriage to *Harwich*, and at and from thence by a packet to *Gottenburgh*, beginning the adventure upon the said goods from the loading thereof, aboard the said ship, &c., and set forth in the usual way the

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printed form with the usual risks enumerated in the printed form of a marine policy, and that it was agreed that the goods should be valued on a cask containing bullion, marked with a specified mark at 1500*l*. It then averred that by the said policy, the insurance was declared to be on a cask containing bullion marked and valued as aforesaid, and that the said cask was in good safety at London, and there delivered to certain carriers to be carried from London by land carriage to Harwich, and that afterwards the same, by the fraud and negligence of the servants and persons employed by the said carriers in and about the carriage thereof, were wholly lost to the proprietors, &c. General demurrer to this count, and joinder.

*Scarlett* in support of the demurrer, contended that there was not any loss stated in this count, which came within the terms of the policy. Taking it that the terms of the policy upon the marine adventure, were meant to be incorporated (as far as may be) into the land adventure, and therefore that the enumeration of marine perils is to be extended to the corresponding perils by land, none of the perils enumerated in the printed form cover the present loss. The peril against "thieves" has been considered as not covering theft of the master and mariners (a); and "barratry" does not mean fraud and negligence, but fraud only of the master and mariners (b); and for what reason should these perils be extended farther as against the acts of servants and persons employed by carriers, than they are against those of master and mariners, who are the servants of the owner? Another objection to this count is, that it

(a) See *Malyne Lex Merc.* c. 25.

(b) See *Fallejo v. Wheeler, Corp.* 134. per Lord Mansfield.

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only avers that the goods were delivered at *London* to the carriers to be carried; whereas by reference to the policy as it regards the marine risk, it appears to require a loading on board at the place whence the risk is to commence (*a*), and by the same rule a loading at *London*, whence the land risk is to commence, is also required. The insurance is on goods lost or not lost by land carriage, which must mean after the land carriage has commenced; and therefore the count ought to have averred that the goods were loaded at *London* in the waggon or carriage, to be carried to *Harwich*. If this had been a loss by marine perils, and the count had only averred a delivery of the goods to the owner of the ship at his warehouse at *Harwich*, it would have been insufficient to entitle the plaintiffs to recover.

Lord ELLENBOROUGH C. J. asked if it was necessary to travel into the marine policy in order to search out a corresponding risk, or whether an insurance on goods by land-carriage without more, did not cover damage arising from miscarriage. What else could the assured mean to insure? But supposing it necessary to have recourse to the marine policy, even then the word *barra-try* was large enough to include every species of fraud or *malus dolus* committed by the waggoner or servants, taking them to stand in place of the master and mariners: therefore *quacunque viâ* this risk was included. Upon the other point his Lordship said, that "by land carriage," meant from the time the goods were put into the charge of the carrier.

*Per Curiam,*

Judgment for the Plaintiffs.

*Richardson* was on the other side.

(a) See *Spitta v. Woodman*, 2 Taurnt. 416

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DOE, on the Demise of THOMAS LOWES,  
against DAVIDSON.

Tuesday,  
Nov. 23d.

**EJECTMENT** for premises in the parish of *Halt-whistle* in the county of *Northumberland*. At the trial before *Bayley J.* at the summer assizes for that county 1812, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

Prior to and in the year 1749, *W. Lowes* was seised to him and his heirs, according to the custom of the manor of *Ridley*, of several customary estates within that manor, in respect of which he was entitled to rights of common upon the commons and waste grounds after mentioned to be divided, inclosed and allotted. By the custom of the manor of *Ridley*, customary estates in that manor pass either by surrender and admittance at the lord's court, or by any other species of common law conveyance for passing freehold estates accompanied by the licence of the lord, but they are not devisable by will. By articles of agreement bearing date the 12th of *February* 1749, between *Sir E. Blackett* the then lord of the manor of *Ridley*, and several persons therein mentioned, to be entitled to right of common in two certain commons within the manor called *Ridley Moor* or *Common* and *Hotbank*, it was

Where allotments were made and awarded to *W. L.*, in respect of several customary estates, of which he was seised in fee according to the custom of the manor, under an agreement between the lord of the manor and the commoners, and an award made thereon, which were confirmed by an inclosure act, and which agreement contained a clause saving to the lord all mines, and all royalties and privileges in tam amplo modo as he had enjoyed the same within the ancient customary tenements, and the award contained also a clause saving to the lord all seign-

ories and royalties incident to the manor, and the act saved to him the seignories and all rents, services, courts, &c. and all other royalties, jurisdictions, and preeminences incident to the manor in tam amplo modo as he might have enjoyed the same in case the act had not been made; and also contained a clause that nothing should alter or annul any settlements, &c. affecting the lands to be inclosed, but that the several allotments should be held by the several persons to whom allotted to the same uses, and for the same estates, and subject to such limitations, &c. as the lands in respect of which such allotments were made, were limited to: held that the allotments so made were freehold and not customary estate; and therefore were not within the custom of the manor, that customary estates are not devisable by will.

agreed

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agreed that such commons should be divided and set out by certain persons named, who should apportion to the lord of the manor, for his consent to the inclosure and as a recompence for his right in the soil, one full two and thirtieth part of *Hotbank* only (the former lords of the manor having theretofore with the consent of several persons entitled to a right of common upon *Ridley* common, inclosed a large part of the said common, in full for the share of the lord of the manor on *Ridley* common, as lord and in right of the demesne lands within the said manor) which two and thirtieth part was to be allotted to Sir *E. Blackett*, over and above the part and share of the said two commons thereby agreed to be set off to him in respect of certain tenements therein mentioned; and after such allotments to divide the said two moors and commons amongst the said Sir *E. Blackett* and the several persons parties thereto, having right of common thereon, according to the real yearly worth and value of their respective messuages, lands and hereditaments. And it was thereby further agreed that after the division was finished all rights of common on the said common should cease, *saving to Sir E. Blackett his heirs and assigns for ever all mines, minerals, quarries, waifs, estrays, and all and every the royalties and privileges which he had enjoyed, and which had been enjoyed by the several lords of the said manor, in as ample a manner as they had enjoyed such royalties and privileges within the ancient customary tenements within the said manor, &c.* On the 30th of May 1751, an award was made by the commissioners appointed under the said articles of agreement, whereby amongst other allotments they allotted to *W. Lowes* and his heirs, one hundred and seventy four  
acres

acres and thirty-four perches, and also another allotment of four hundred and eleven acres on *Ridley* common, and four hundred and fifty acres two roods and twenty-two perches on *Hotbank* common, and that he and his heirs should build and for ever thereafter uphold and maintain certain hedges to the said allotments. The award contained a proviso, *that nothing therein contained should extend to prejudice, lessen, or defeat the right, title, or interest of the said Sir E. Blackett, his heirs or assigns, lords or ladies of the manor of Ridley, in or to the seignories and royalties incident and belonging to the said manor, but that he and they should and might at all times for ever hold and enjoy the same.* The allotments mentioned in the award to be made to *W. Lowes* were made to him in respect of his right of common for his said customary estates. By 25 G. 2. c. 24. (a), reciting the said articles and award, the same were thereby confirmed, and it was provided that nothing in that act contained, should extend or be construed, deemed, adjudged, or taken to revoke, make void, alter, or annul any settlement, deed, will or lease whatsoever, or to prejudice any person or persons having any right or claim of dower, jointure, rent service, debt, charge, or incumbrance in, out of, upon, or affecting any of the lands or grounds so agreed and directed to be inclosed and divided as aforesaid, or any part or parcel thereof respectively, but that the several allotments of and in the said two moors or commons, made or allotted by the said award, should from the 30th of *May* 1751 be deemed to belong unto and at all times thereafter, be, remain, and enure to, and be held and enjoyed

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(c) Private act.

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by the several persons to and for whom the same were so respectively allotted, and those claiming under them, and that the said several persons, and those claiming under them, should from thenceforth stand and be seised and possessed thereof respectively, to such and the same uses, and to and for such and the same estates, and subject to such and the same wills, limitations, conditions, settlements, provisoes, remainders, reversions, leases, debts, charges, and incumbrances, as the several messuages, cottages, lands, and grounds, in respect whereof such allotments were made to them respectively, were and stood severally limited and liable unto. The act also provided that *nothing therein should prejudice, lessen, or defeat the right, title, or interest of him the said lord of, in, and to the seignories and royalties incident and belonging to the said manor*, but that he the said lord, and all and every person and persons claiming under him as lords of the said manor for the time being, should and might at all times for ever thereafter hold and enjoy *all rents, services, courts, perquisites, and profits of courts, mines, goods, and chattels of felons and fugitives, felons of themselves and put in exigent, deodands, waifs, estrays, forfeitures, and all other royalties, jurisdictions, and pre-eminences whatsoever, to the said manor, incident, appendant, belonging, or appertaining*, (other than and except such common right as could or might be claimed by the lord or lords respectively, as lord or lords of the said manor, or otherwise) in and upon the two commons to be inclosed, in as full ample and beneficial a manner to all intents and purposes as he or they could or might have held and enjoyed the same in case that act had not been made. The premises for which this ejectment

was brought, are allotments made under the said articles of agreement and award confirmed by the act of parliament, some of which allotments were purchased by *W. Lowes* after the award, and the others were made and awarded to him in respect of his estates of which he was seised to him and his heirs according to the custom of the manor of *Ridley*. Ever since the allotments have been made under the agreement, they have as far as appeared at the trial, been conveyed as freehold without the licence of the lord, and without any surrender or admittance, and those purchased by *W. Lowes* were conveyed to him by lease and release without any licence or concurrence of the lord. *W. Lowes* by his will dated 1783, devised to his eldest son and heir *John Lowes* and his heirs, all his real estates without mentioning customary, and died in the same year. *J. Lowes* after his father's death was admitted at the lord's court to the customary estates of which his father died seised as heir to his father, and by his will dated the 27th of *December* 1795, after devising certain messuages, &c. for the payment of debts and legacies, devised all and singular his manors, messuages, lands, mines, advowsons, tithes, and hereditaments, and all other his real estate whatsoever, as well copyhold and customary as freehold, not thereinbefore devised, unto and to the use of his son *W. C. Lowes* and the heirs of his body lawfully to be begotten, and in default of such issue to the only proper use and behoof of the said *J. Davidson* (the defendant) his heirs and assigns for ever. In *December* 1795 *J. Lowes* died seised amongst other things of the premises in question, leaving an only child the said *W. C. Lowes*, then an infant under the age of six years, who afterwards

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died without issue and without having attained the age of 21. *Thomas Lowes* (the lessor of the plaintiff) is the brother of *J. Lowes* and uncle and heir at law to *W. C. Lowes*.

The question for the opinion of the Court is whether the plaintiff is entitled to recover; if the Court shall be of that opinion the verdict to stand; otherwise a non-suit to be entered.

*G. Marriott*, for the plaintiff, after adverting to that part of the case which states that by the custom of the manor, customary estates in that manor pass by surrender, &c. but are not deviseable by will, said the question was whether the new allotments passed by the will of *J. Lowes*, or whether the above custom extended to them. And he contended that it did inasmuch as by coupling the agreement, award, and act of parliament together, it appeared from them to have been the intention of the parties, that the new allotments should be subject to the same usages as the customary tenements were subject to, which could only be effected by making them of the like customary tenure. The private act of parliament, as well as the agreement and award, is to be construed according to the intention of the parties (*a*), and it is clear that the lord intended to secure himself against any possible diminution of his rights over these allotments, for the agreement saves all mines, waifs, estrays, and all royalties and privileges, in tam amplo modo as he had enjoyed them within the ancient customary tenements; and the award expressly provides, that nothing shall lessen his right to the seignories and royalties. Then the act of parliament

(a) Per *Ld. Kenyon* in *Trenby v. Gibson*, 2 T. R. 705.

in the same spirit, makes the same and other more extensive reservations in favor of the lord, reserving to him every incident of customary tenure, to be enjoyed in tam amplo modo as if the act had not passed; and there is besides a previous clause touching the new allotments, which provides (inter alia) that the same shall belong to the several persons to whom allotted, to and for such and the same estates, &c., as the several messuages, &c. in respect of which such allotments were made, were limited to. And how could they be subject to the same estates as the ancient messuages, unless the lord had the same rights in respect of them? So that if any doubt had remained on the previous documents, the act of parliament seems to have removed it and made all clear. This view of the case is consistent also with the rule of law; for these allotments being made in right of the customary tenements, the law would incline to consider them as customary; for the rule is that the accessory must be of the same nature as the thing to which it is appendant, or as it is elsewhere said "a thing that cometh in lieu of another is to be as if it were the same" (a). And though in *Revell v. Jodrell* (b) it was laid down, that this rule shall not be good to create a copyhold, because a copyhold cannot be created by operation of law, yet it may be good as an argument to shew that the act of parliament intended to create it. *Revell v. Jodrell* (c) and *Townley v. Gibson* (d), are distinguishable from the present, because there the wastes were expressly given to the tenants in free socage and fee simple. As to the reservations in favor of the lord, it may be farther observed

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(a) *Finch's Law*, 67.

(b) 2 T. R. 424.

(c) *Ibid.* 415.(d) *Ibid.* 701.

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that the agreement expressly reserving all royalties and privileges as he had enjoyed the same within the customary tenements, is in that respect, stronger than either the award or act of parliament, for they say only royalties, &c. incident and belonging to the manor, and so will help to explain them. And almost all the reservations contained in the act are inconsistent with the notion of the tenants having the freehold. Such for instance is the reservation of mines; and rents, services, courts, &c., seignories and all other royalties and jurisdictions incident to the manor, could not, according to *Bradshaw v. Lawson* (a), be reserved by any deed, by reason of the statute of quia emptores (b), if the estate in respect of which they were due, were conveyed away to the tenant. Nor in such case could they be reserved by a private act of parliament, which is in the nature of a deed, and shall not be taken to control the statute of quia emptores. Again the word "forfeiture" occurs, which as it is there used must be understood, either propter delictum, or propter defectum sanguinis; but the right of escheat enures by way of reversion (c); the land results back to the lord of the fee (d), which shews that it must still be holden of him.

*Scarlett*, contra, was stopped by the Court.

LORD ELLENBOROUGH C. J. I think there is no occasion to trouble the other side. This is an ejectment brought by *Thomas Lowes* claiming as customary heir of *W. C. Lowes*, the only son and heir of the tes-

(a) 4 T. R. 443.

(b) 18 Ed. 1, st. 1.

(c) 1 Bl. R. 133. *Burgess v. Wheate*.

(d) 2 Bl. Com. 244.

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tator *John Lowes*, to recover premises which the defendant claims to hold, as freehold, as devisee under the will of *J. Lowes*. The question resolves itself into this, whether the premises be customary estate of the like tenure, which the customary estates in respect of which they were allotted were before the agreement and award stated, and before the passing of the act of parliament, or whether they are now freehold. The case states that in 1749, by agreement between the then lord of the manor and several persons entitled to right of common over two commons within the manor, it was agreed that such commons should be divided and set out by persons then named, who should apportion to the lord, for his consent to the inclosure, and as a recompense for his right in the soil, a certain portion of one of those commons, which portion was to be allotted to him over and above his share in respect of certain tenements; and it was agreed that the rest should be divided amongst the said lord and the several persons having right of common according to the yearly value of their respective tenements; and it was further agreed that after the division, all rights of common over the said commons should cease, saving to the lord all mines, &c. and all the royalties and privileges which he had enjoyed, and which had been before enjoyed by former lords within the customary tenements. Now if it was the intention of the parties by this agreement to constitute an estate of a customary nature in these allotments, it was a thing which by the law of the land they were not competent to do. It was decided in *Revell v. Jodrell* and *Townley v. Gibson*, that such a species of tenure could not be created at this time of day; because it is an essential quality of such an estate that

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it must have been immemorially demised or demisable as customary estate; and as it must always have been of such quality, it follows that this quality cannot be created by any modern agreement. If therefore this agreement was framed with any such intent, it cannot have an operation to that effect. Then let us go on to the award, and see what the intention of that was. The lord gave up a portion of the entire soil, which he before had, in lieu and satisfaction of what the commoners gave up and had before, namely, an entire right of common; he recedes from his right in respect of the entirety of soil, and what is allotted to both parties conveys to both a right of soil: it is an entire and exclusive interest in the soil in that portion which is allotted to the lord, as well as in those portions which are allotted to the commoners in satisfaction of their rights of common. But much stress has been laid on the words saving all seignories and royalties to the lord. But the lord enjoyed in his own land no seignories or royalties, except perhaps that of free warren or the right of appointing a game-keeper. He had the entire dominion over the soil subject to the tenants' right of common. The award therefore, carries it no farther. But then comes the act of parliament; and the question is upon the act; for I assume it as incontrovertible that a copyhold cannot be created at this day, except by act of parliament, or by custom to warrant the granting the waste as copyhold; and then it is by operation of the custom, which when the lord shall have granted any portion of the waste, although it has not been granted before, makes that which was potentially demisable before as copyhold absolutely so; but subject to this clear exception the proposition is

incontrovertible that a copyhold cannot be created at this day. But still it is competent for the legislature to create it, and in order to see whether that has been done, let us look to this act, and examine whether it has made this copyhold. The act provides that nothing therein contained should extend to alter or annul any settlement, &c., but that the several allotments shall be deemed to belong to and thereafter shall be enjoyed by the several persons to whom the same are allotted; and those claiming under them, and that they from thenceforth shall stand seised thereof, to such and the same uses, and to and for such and the same estates, &c., as the several lands in respect whereof such allotments were made, were and stood limited to. This does not mean that because the original estates were in their tenure antecedently customary estates, therefore the allotted estates should follow the same tenure and be customary too; but that where there happened to be any settlement or conveyances before and then subsisting, which affected the lands to be inclosed, whether such settlements, &c. might have carved out estates for life or in tail, or whether they might be in fee, the same should affect the lands allotted, which should be subject to the same. That I take to be the meaning of the provision, taking the whole context together, that they should be subject to the old uses; and that seems to me to be the only fair interpretation of this clause. Then comes the saving with respect to the lord's right "that nothing should prejudice or defeat the right of the lord to the seignories and royalties incident to the manor; but that he and those claiming under him, should enjoy the same in as full and ample a manner, to all intents and purposes

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purposes as they might have enjoyed them, in case the act had not been made." In one respect it may be said, the lord does not enjoy in as ample a manner as before the act; for before, the tenants had a right of common over the whole, which rendered their several copyholds of so much more value; but the lord had also a right of soil over the whole, and has gained his equivalent by means of the exclusive allotment made to him in respect of that right. Therefore taking the whole of the act together, there is nothing to prejudice the lord. "In as ample a manner as if the act had not been made," cannot confer any new right, but reserves only such rights as he had before. What I am now laying down is precisely what Lord *Kenyon* said in *Townley v. Gibson*, where examining how the tenants in that case held their allotments under the act, he said they could not take as copyholders, unless the act of parliament had so directed, but they took their allotments as freehold estates of inheritance; and he added "it is extremely clear that no new tenure can be created, unless by the authority of parliament, since the statute of quia emptores; nor can any person reserve to himself a right of escheat." The same doctrine is laid down expressly by *Ashhurst J.* delivering the opinion of the Court in *Revell v. Jodrell (a)*; "it is held clearly that a copyhold must be time out of mind, and cannot begin at this day;" for which he cites *Co. Lit.* 58. b. and the case of *Kempe v. Carter*, 1 *Leon.* 55., where it was held that notwithstanding the lord granted de facto, yet as he did not grant secundum consuetudinem manerii, the land was not customary. For it had been

(a) 2 T.R. 424.

contended by *Hill* Serjt. in the argument of *Revell v. Jodrell*, as it has been contended to-day, that if one thing be given in lieu of another, it must be as the thing itself; and that therefore what was given in that case to the tenants in lieu of their copyhold interests must be copyhold. It was considered in that case that a copyhold cannot be created at this day by act of the parties. It may be by act of parliament. The question then is whether this act has made it such, and I cannot find any words that can be considered as importing that meaning. These premises have been granted without the licence of the lord as freehold; and must go to those who are entitled to claim them as passing under the will as freehold.

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LE BLANC J. The land which is the subject of this ejectment was the freehold land of the lord of the manor, before the passing of the 25 G. 2. c. 24. The only question is, whether any thing has happened with respect to this land, which has changed the nature of its tenure. It belonged to the lord as his freehold subject to certain rights of common, which the customary tenants had over it. For the purpose of putting an end to those rights, articles of agreement were made between the lord and the tenants for dividing such commons, and subjecting them to the award of persons, who should apportion to the lord a portion in lieu of his rights, and to the tenants another portion in lieu of theirs. That agreement and award were afterwards confirmed and carried into effect by the act of parliament. So the case stands upon the facts; and it is perfectly clear upon the law, that a customary tenure cannot be created at this day by the act of the parties,

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but there must be a custom to warrant the granting it : it cannot be created by operation of law. Taking that as an incontrovertible proposition let us see whether any thing has changed the nature of this tenure. The principle is true to a certain extent, that *accessorium sequitur principale*, and so far perhaps it may be said that those rights of common were of customary tenure so long as they continued appurtenant to the principal land. But after this agreement was entered into, and in pursuance of it, the lands were allotted to the commoners in lieu of their rights of common, the lands allotted could not follow the nature of the tenure of the principal land, although allotted in lieu of rights of common, which were appurtenant to and did follow the nature of the principal. Let us then advert to the act of parliament, for the difficulty that has been raised is caused by certain expressions inserted in the agreement, and copied into the act, which have been relied on in argument. The agreement contains these expressions which have been so much commented on, " saving to the lord, his heirs, &c., all mines, &c., and all and every the royalties and privileges which he had enjoyed, and which had been enjoyed by the lords in as ample a manner as they had enjoyed the same, within the customary tenements within the manor." It has been argued, that this saving clause must have been intended to have the effect of making these allotments to be of customary tenure; for otherwise they would be freehold with incidents inconsistent with a freehold tenure. If the argument had rested solely on the agreement I should have been of opinion that this clause, whatever might be its intention, could not have had the effect of making them of customary tenure, because

because that would be doing what could not be done by law. But undoubtedly the act of parliament may have that effect, and let us see whether it has made them customary. The act recites the agreement and award, and confirms them, and then follows a saving clause, which is different from that in the agreement, and cannot be controlled by it even if it were of greater force than it really is. That clause provides, that nothing should be taken to alter or annul any settlements or incumbrances affecting the lands to be inclosed and divided, but that the several allotments should remain to the several persons to whom allotted, and that they should enjoy the same to and for the same estates, settlements, and incumbrances as the lands in respect of which such allotments were made, were liable to before. The meaning of all this is, that nothing by which these allotments are given to the several persons as freehold, shall be deemed to have the effect of altering the quantum of interest which those persons may be entitled to under any subsisting settlements of the principal estates. Then follows the saving clause with respect to the lord, which provides "that nothing shall extend to defeat the right of the lord to the seignories and royalties incident to the manor, but that he shall have the same at all times, in and upon the two commons to be inclosed, in as full ample and beneficial a manner, and to all intents and purposes as he might have had in case the act had not been made." That reserves to him only the same rights over the freehold land now become the freehold of the tenants, which he before enjoyed as lord over the same land when it was his own freehold. So that if the clause in the agreement could be considered as of more extensive operation, still the act of parliament would

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would not adopt it to that extent, but would only give to the lord the same rights as he enjoyed over the allotments before they were allotted, and while they were his own freehold. Therefore if the words of the agreement were of doubtful construction, yet it is most manifest that the legislature never intended to make the allotments of a different tenure from what they had been before. It seems to me that this is the true construction; and therefore the *postea* must be delivered to the plaintiff.

BAYLEY J. I am of the same opinion. I see nothing to shew an intention that the property to be allotted should, from the passing of the act of parliament, be of a different nature from what it was before. At the time of the passing of the act the property was the lord's freehold, subject to certain rights of common over it. It seems that the lord had also in respect of certain tenements turned out on the common; and the agreement provides in respect of one of the commons called *Hotbank* that the lord should have a portion of it as a recompence for his right in the soil; and in respect of the other common, that he should have nothing, inasmuch as former lords had received a recompence out of that upon a former occasion; and it was further agreed that the residue should be allotted among the commoners. Certain savings in the agreement have been relied on to shew that it was intended that the tenure of these allotments should be changed. In the first place, it could not be changed by the mere act of the parties: but supposing it could, the words of the agreement are not sufficient to shew any such intention. They are these: "saving to the lord, his heirs, &c. all mines, &c. waifs, estrays, &c. and all royalties and privileges

privileges which he and other lords had enjoyed, in as ample a manner as they had before enjoyed them within the ancient tenements within the manor." The rights of the lord as lord of the manor only, and not his reversionary interest as lord of the fee in the customary estates, properly fall within those terms. The latter could only come within the words royalties and privileges, which however are equally referable to other rights. So the word "seignory" in the award is consistent with a tenure in fee simple, and was so considered in *Townley v. Gibson*. And the first clause of the act was not meant to interfere with the tenure of the lord and the several persons to whom the several allotments were made, but merely to regulate the interests of the several persons as to the course or channel in which the allotments should go. Former proprietors might have carved out estates either in tail, or for life, or years, or they might have burthened them with charges or incumbrances. The clause therefore in the act of parliament, which is a common one, provides that nothing in the act shall extend to alter any conveyance or incumbrance, but that the lands allotted shall go according to the limitations in those conveyances, in the same manner as the original lands would have gone. Then comes the proviso in favour of the lord (here he stated it). What royalty or seignory incident to the manor will at all be interfered with, by holding that the several tenants take a freehold interest in the land in question? In *Townley v. Gibson* there were as ample words as in this saving clause, and yet the tenants were considered as holding their allotments in fee simple, discharged of every right not expressly reserved to the lord; and it was understood to be consistent with that holding

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holding that the lord should retain all the rights reserved to him in the saving clause. That saving clause provided that nothing should extend to prejudice the right of the lady to the seignories incident to or belonging to the manor, (a strong expression which has been pressed upon us in this case,) but that she should enjoy "all rents, forfeitures, &c. and all other royalties and manerial jurisdictions in as ample a manner as if the act had not been made." The savings therefore in that clause in favour of the lady were as extensive as those in this clause; nevertheless it was decided that the tenants took their several allotments in fee simple. I have no hesitation in saying, that there are not any words to be found in this act which shew that it was the intention of the parties that these allotments should be holden as customary. There is one part of the argument, viz. that a private act of parliament could not, if ever so explicit, create a species of tenure contrary to the statute of quia emptores, to which I do not assent; for I apprehend that the legislature may dispense either in a private or public act with the provisions of a former public act, if they use distinct terms for that purpose.

DAMPIER J. I am of the same opinion. It appears quite clear that nothing but an act of parliament or custom can authorize the creation of a copyhold tenure at this day. And in so important a creation it should appear by express terms that it was the clear intention of the legislature to create it. This has been the prevailing opinion in cases of modern acts of parliament, so that persons who are familiar with these acts know that when it is intended to create such a tenure, it must be inserted that so much shall be copyhold and so much freehold.

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freehold. And I have known of instances, when that has been omitted to be done, of new acts having been obtained for the simple purpose of making such a provision. It is most especially necessary in this case that a clear intention should be shewn, where it appears that for 60 years last past these allotments have been conveyed as freehold. The question then is, whether there be any thing in the agreement, award, or act, to shew any such intention. The agreement has no reference to any act to be afterwards passed. Is it then to be taken that the parties to the agreement meant to create customary estates? The answer to that is, that whatever they might intend they could not by law effect it; and besides, if they had intended it, would it not have been a much shorter way to have expressed at once that it was agreed that the allotments should be customary? In like manner as to the award, if this intention had been signified to the commissioners, it is probable their award would have been more precise on the subject. The words seignories and royalties have slipped into their award; but there is nothing more. In both cases it is also probable that there would have been some reference to the act of parliament to be passed; by the authority of which alone such an intention could have been effectually executed. I do not collect therefore from either that it was the intention of the parties to create such a tenure, which could alone be done by the act of parliament. But let us see what is contained in the act. The first clause, which provides that the allotments shall be subject to the same incumbrances, &c., is a common clause in these acts. And though it is possible by picking out some particular words to raise an argument on them, when disjointed from the context, to shew that the

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allotments would not be subject precisely to the same estates as the principal lands, unless the lord had the same rights in respect of them; yet the whole must be taken together; and then it will appear that that clause is wholly *alio intuitu*, and meant only to provide that the incumbrances which had attached should remain, and the allotments go in the same channel. The last clause, I own, appears to me to have no weight. What customary rights, or suit of court, or perquisites and profits of courts, &c. had the lord over this waste which he held *pleno jure*? It appears to me to amount to nothing more than this, that as before the lord might have the appointment of a game-keeper, or a right of felons' goods, and such like, that he should continue to enjoy the same; it goes no farther; it does not establish the proposition insisted on in argument, which ought to be made out by clear words. The only argument of any weight is this, that the lord has by agreement diminished his own rights by accepting a statutable release of the right of common. I answer, that the lord considered that in the compensation which he received for those rights by the quantum of land which was set out to him. For these reasons I think there ought to be judgment for the defendant.

*Postea to the Defendant.*

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WOOD and Another *against* DODGSON.Tuesday,  
Nov. 23d.

COVENANT: the plaintiffs declare, that by indenture of the 6th of *May* 1811, made between *Dodgson* (the defendant) of the first part, and the plaintiffs, *John Wood* the elder, and *John Wood* the younger, of the second and third part, after reciting that in 1804 *Dodgson* and the *Woods* had agreed to become partners in the business of warehousemen for 10 years, and had continued in such partnership to the date of the indenture, and that they had agreed to dissolve the same on certain conditions, it was witnessed, that in pursuance and in part performance of the said agreement, the said parties did dissolve the same; and that in farther performance, &c. and in consideration of the sum of 300*l.* a-piece to be paid to the *Woods* by *Dodgson*, and of the covenant by *Dodgson* for indemnifying them against all the debts and engagements of the said partnership to the date of the said indenture, they the *Woods* did assign and set over to *Dodgson* all their shares and interests in the stock in trade, ready money, debts outstanding, and effects belonging to the partnership; and also all the dividends on certain debts therein specified, together with all the books of accounts, &c.; to hold the same to *Dodgson* as his own. And *Dodgson* did thereby covenant with the *Woods* that he would pay, satisfy, and discharge all and all manner of debts then due and owing from the partnership, and would indem-

Where upon a dissolution of partnership between three partners, two of the three assigned to the other all their shares in the partnership debts and effects, and the other covenanted to pay all debts then due from the partnership, and to indemnify the two from the payment of the same, and from all actions and costs by reason of the non-payment of the same, and afterwards became bankrupt, and a commission issued against him, under which he obtained his certificate, and afterwards the holder of a bill accepted by the three partners, and due before the dissolution of the partnership, sued the two, and they were obliged to pay the bill: Held that by stat. 49 G. 3. c. 121. s. 8. the two against the

certificate might be pleaded in discharge of an action brought by the other upon his covenant.



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nify them from the payment of the same, and also from all actions and costs which might accrue to them by reason of the nonpayment of the same, &c. The plaintiffs then assign for breach, that after the making of the indenture, to wit, on the 4<sup>th</sup> of *February* 1813, one *Wylie* sued the plaintiffs upon a bill of exchange, dated the 4<sup>th</sup> of *July* 1810, drawn by *Wylie* before the time of making the indenture, upon and accepted by the partnership for the sum of 155*l.*, payable at six months after date, and which bill was accepted by the partnership for a partnership debt due before the time of making the indenture; and such proceedings were had that afterwards, to wit, on the 13<sup>th</sup> of *April* 1813, the plaintiffs were obliged to pay and did pay to *Wylie* 121*l.* 18*s.* 6*d.* in satisfaction and discharge of the sum of money in the said bill of exchange mentioned, and for interest thereon, and for the costs and charges of the said suit; by means of which the plaintiffs were and still are damnified, &c.; yet the defendant hath refused to pay, &c.

The defendant pleads (inter alia) that on the 1<sup>st</sup> of *January* 1812, he was a trader, &c., and afterwards, to wit, on the 15<sup>th</sup> of *April* 1812 became bankrupt, and a commission was issued against him; and then sets forth the proceedings under the commission, and that on the 5<sup>th</sup> of *June* following he obtained his certificate; and that the indenture mentioned in the declaration was made before the 15<sup>th</sup> of *April* aforesaid; and although the plaintiffs did pay 121*l.* 18*s.* 6*d.* to *Wylie* after the said 15<sup>th</sup> day of *April* when the defendant became bankrupt, and the commission issued as aforesaid, yet that immediately from and after the time of the said payment the plain-  
tiffs

tiffs were enabled to prove, and might have proved, the said sum of 121*l.* 18*s.* 6*d.* under the said commission, without disturbing any dividend or dividends already made.

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DUGGON

Demurrer and joinder.

*Scarlett*, in support of the demurrer, stated the question to be whether the stat. 49 *Geo.* 3. c. 121. s. 8. has discharged the defendant from his covenant by reason of the certificate. The law, as it stood before that statute, would not have discharged him, inasmuch as the plaintiffs did not pay the debt until after the issuing of the commission. But the statute enacts that "where at the time of issuing the commission any person shall be surety for or be liable for any debt of the bankrupt, it shall be lawful for such person, if he shall have paid the debt, although he may have paid it after the commission shall have issued, to prove his demand in respect of such payment as a debt under the commission, and every person obtaining his certificate shall be discharged of all demands at the suit of such person having so paid, or being hereby enabled to prove, &c. with regard to his debt in respect of such suretyship or liability, in like manner as if such person had been a creditor before the bankruptcy for the whole debt, in respect of which he was surety or so liable." Now in order to bring the plaintiffs within this clause it must be shewn, that they were sureties for, or liable for a debt of the bankrupt; for the clause is confined to persons who have paid the debt as sureties, or as being liable for the bankrupt, and not as being liable on their own account; and in such case the bankrupt is discharged by the certificate. But here the plaintiffs have merely

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paid a debt for which they were themselves liable, and not as sureties for or as being liable for a debt of the bankrupt. It is true that the bankrupt has covenanted with them to pay this debt; but how does that render the covenantees liable for any debt of his at the time of issuing the commission? When he made default and they were obliged to pay, then indeed they became entitled to sue him on the covenant: but there was not any debt of the bankrupt for which they could be liable until the time when they actually paid the debt which he had covenanted to pay. But that time was long after the issuing the commission. Suppose there had not been any covenant between them, but merely a dissolution of the partnership, and then the plaintiffs had been called on to pay a partnership debt after the bankruptcy of the defendant and after the issuing of the commission; in that case they would have been entitled to an action for contribution against him; and it would not have been barred by the certificate. The only difference then which the covenant makes is to give them a remedy by action of covenant instead of assumpsit. And if they were not liable for the debt of the bankrupt at the issuing of the commission, neither were they sureties. The term surety means a person who pledges himself to the original creditor for the debt of another: but not a person who being originally liable himself has taken a covenant from another to pay his own debt, and only remains liable as between him and the covenantor in case the latter makes default. The case therefore does not fall within the words of the act; and this being an alteration of the law much to the prejudice of the plaintiffs' rights, ought not to be carried beyond the express words.

*Abbott,*

*Abbott*, contra, was stopped by the Court, after having referred to *Ex parte Lloyd* (a), and *Ex parte Lobbon* (b).

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LORD ELLENBOROUGH C. J. This is quite a new case, and depends entirely upon the words of the statute, but I cannot help thinking it falls within them. Before the statute, this debt could not have been proved under the commission. The statute does indeed seem to impose a hardship on the plaintiffs, but at the same time they will not be in a much worse situation than if they were to pursue a fruitless suit. The words of the statute are "where any person shall be surety for or liable for any debt of the bankrupt." Here the plaintiffs have assigned all their interest in the partnership effects in consideration of a covenant of indemnity on the part of the bankrupt, which left them still liable as before to the original creditors of the partnership; they were liable at law as co-debtors with the bankrupt for his and their own debt, but in equity he was solely liable, and they were sureties; for by the covenant he became, as between the parties to the covenant, the principal debtor, the debt was his debt, although as to other parties the plaintiffs still remain liable, and therefore when they paid this debt, they paid it in his discharge. I cannot therefore say that this case does not fall within the act of parliament, which does not merely contemplate legal, but equitable liability.

LE BLANC J. The words "liable for any debt of the bankrupt" are large enough to comprehend this case;

(a) 17 Ves. 245.

(b) *Ibid.* 334.

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and we are to see that the case falls within the remedy which the act proposed to hold out in favour of bankrupts. Before the act the original debt would have been barred by the certificate, and the remedy proposed, seems to have been, that when any person at the issuing of the commission should be surety for or liable for the original debt of the bankrupt, the bankrupt should be relieved in the same manner from all claims of such person arising out of the original debt, although the cause of action arose after the bankruptcy. Where the words therefore are large enough, and it appears that the remedy was intended, I rather think we ought to give effect to it.

BAYLEY J. The intention of the legislature, at the same time that they relieved the bankrupt was to confer a benefit also on the surety, or person who was liable for the debt of the bankrupt. The principal creditor might have proved under the commission, or might have resorted to the surety without proving under the commission; therefore, before the act he might have compelled the surety to pay the whole amount, without the surety's having any benefit under the commission. This clause therefore was intended to remove that inconvenience, and to give to the surety the power of obtaining a dividend in respect of his debt. In this case, if the plaintiffs have let slip their time by not making so early a claim as they *might*, that was their own fault; because they ought to have known that this was an outstanding debt, for which the bankrupt's estate was liable.

DAMPIER

DAMPIER J. It seems to me that this case falls within the words of the act. As before the act the surety was thrown on the future estate of the bankrupt, the act by allowing him to prove on the bankrupt's estate, may be a benefit both to the bankrupt and the surety; on the other hand, it may happen that the surety is not compelled to pay the money until the whole estate is gone. It is to be presumed that the legislature balanced these inconveniences, and determined upon the whole to give a benefit to the bankrupt, by putting the surety upon the bankrupt's estate. I think we cannot get out of the act.

Judgment for the Defendant.

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against  
DUNSON.

*The KING against CHARLES DUNNE.*

*Wednesday,  
Nov. 24th.*

THE defendant having been found guilty upon an indictment for an assault, upon his coming up for judgment, it was agreed between the parties, (with the leave of the Court) to go before the Master. The Master, after hearing the parties, by his allocatur awarded to the prosecutor 13*l.* 15*s.* for his damages, and 6*ol.* 17*s.* 7*d.* for his costs, for nonpayment of which the defendant was attached.

Defendant in custody on an attachment for non-payment of money awarded by the Master, to the prosecutor of an indictment for an assault, of which defendant is convicted, is not entitled to his discharge under 48 G. 3. c. 123. after having been in prison 12 calendar months, although the sum awarded for damages do not exceed 20*l.* exclusive of costs.

Barry moved under these circumstances upon stat. 48 G. 3. c. 123., for a rule nisi to discharge the defendant out of custody of the Marshal, on the ground that he had been upwards of 12 months in custody, in execution for damages not exceeding 20*l.* He submitted, that as the Master had distinguished in his allocatur

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allocatur between damages and costs by awarding separate sums for each, the allocatur was the same as the finding of a jury, and that no substantial difference existed between the award of the Master and the finding of a jury; and therefore the damages being under 20*l.* the defendant was entitled to the benefit of the act.

Lord ELLENBOROUGH C. J. after referring to the statute, said that this case came neither within the letter nor the contemplation of the act; that its object was solely directed to civil judgments and not to those of a criminal nature, such as was this case *ab initio*.

BAYLEY J. observed that the case resembled a submission to arbitration; and

DAMPIER J. referred to *Rea v. Hubbard* (a), as in point.

*Per Curiam,*

Rule refused.

(a) 10 *East*, 408.

Wednesday,  
Nov. 24<sup>th</sup>.

### COOPER against JONES.

The Court will not compel the marshal to affile of record a writ of habeas corpus cum causa, by virtue of which a person is committed to his custody in execution.

A Rule nisi was obtained calling on the defendant (the marshal) to affile of record a writ of habeas corpus cum causa, by virtue of which *Charles Cooper* (the defendant in an action of *Wood v. Cooper*) was brought before a Judge of this court, and thereupon committed by him to the custody of the marshal in execution at the plaintiff's suit in an action commenced and prosecuted by him against the said *C. Cooper* in the Common Pleas.

Pleas. The affidavit in support of the rule, stated that a demand of the writ had been served on the marshal, and the expences tendered, to which the marshal said, that he would send an account of the expences; and it also stated that notice of this motion had been served on the marshal, and that since that the file of writs of habeas corpus cum causâ had been searched at the office of the secretary of this court, but that the writ in question was not affiled of record.

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The *Attorney-General* shewed cause, and objected, first, that it was not sworn that there ever was such a writ; and secondly, that if it had been, it was not the practice to affile such writ of record: there was not any place appointed for filing it of record.

*Barnewall*, in support of the rule, stated its object to be to enable the plaintiff to prove an allegation in a declaration against the marshal, for an escape out of execution; and he relied on the words of Lord *Alvanley* in *Turner v. Eyles*, (a) "that the plaintiff is to enter it of record, if he wants to avail himself of the commitment; and on his application, the Court of King's Bench would compel the marshal to assist him in making this entry." And as to the case of *Wigley v. Jones* (b), where it was held not to be necessary to enter it of record, he said that that was a commitment on mesne process, and therefore different from *Turner v. Eyles*, and the present case, which were commitments in execution, and in *Wigley v. Jones*, Lord *Ellenborough* said in such cases it might possibly be otherwise.

(a) 3 *Res. & Pull.* 461.(b) 5 *East*, 440.

Lord



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Lord ELLENBOROUGH C. J. This subject underwent great consideration in *Wigley v. Jones*. The Court then said, that since the argument upon the motion for a new trial they had caused the most diligent inquiry to be made as to the existence of any records of this kind, and they did not find that any such writs of habeas corpus, with committiturs thereon, had ever been returned to, or filed, or kept by the Court or any of its officers, at *Westminster*, or elsewhere, except in the office of the clerk of the papers in the King's Bench prison; but that the writ had always remained as any other warrant naturally would, in the hands of the officer to whom it was immediately directed, and whose voucher or authority for the act of detaining the party it properly was. I believe we conferred with the other Judges at the time upon the subject, and it was thought that what fell from Lord *Alvanley* was under a mistake. After the Court have on much deliberation, decided the point, they ought not to have it reagitated; and therefore the rule must be discharged with costs.

LE BLANC J. It is not even stated in the affidavit that any such habeas corpus as is prayed to be filed, exists.

*Per Curiam,* Rule discharged with costs.

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WARWICK (an Infant) by J. MONTEITH, his  
next Friend, *against* BRUCE.

*Wednesday,*  
*Nov. 24th.*

**A**SSUMPSIT; the plaintiff declares that on the 12th of October 1812, &c., at the request of the defendant, he agreed to buy of the defendant, and the defendant agreed to sell to him all the potatoes then growing on three acres and a half of land of the defendant, at the rate or price of 25*l.* per acre, and so in proportion for the half acre, amounting to the sum of 87*l.* 10*s.* to be dug up and carried away by the plaintiff, and to be paid for by him as hereinafter mentioned; and in consideration thereof, and also in consideration that the plaintiff at the request of the defendant, then and there paid to the defendant the sum of 40*l.* in part payment of the said price, and then and there promised the defendant to dig up and carry away the potatoes, and to pay the defendant the residue of the price agreed on, on the first half of the potatoes being taken and cleared from the land, the defendant then and there undertook and promised the plaintiff, to suffer and permit him to dig up, and carry away the potatoes. And then the plaintiff avers, that he did afterwards dig up a part of the potatoes, and carry away a part of those which were so dug, and was ready and willing, and offered to dig up and carry away the residue and to pay the defendant the residue of the price agreed on; but the defendant did not nor would suffer him to dig up or carry away any more; on the contrary, the defendant afterwards took and carried away a great part of the potatoes so dug as aforesaid, and converted and

An infant may sue on a contract in part executed by him, and which is for his benefit; therefore where defendant on the 12th of October agreed to sell to plaintiff (an infant) all the potatoes then growing on three acres at so much per acre, to be dug up and carried away by plaintiff, and plaintiff paid 40*l.* to defendant under the agreement, and dug a part and carried away a part of those dug, but was prevented by the defendant from digging and carrying away the residue: Held that he was entitled to recover for this breach of the agreement; and that such agreement (being by parol) was not within the 4th section of the statute of frauds.

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and disposed thereof, and of the residue which were not dug up by the plaintiff, to his own use. Whereby the plaintiff was put to great trouble and expence in the digging up a part of the potatoes and also lost all the profits which might and would otherwise have accrued to him from the performance of the said promise of the defendant, &c. There were three other special counts upon this agreement, and the common money counts. Plea, general issue, and notice of set off. At the trial before Lord *Ellenborough* C. J. at the *Middlesex* sittings after last term, it was objected, first, that this contract (being by parol) was within the fourth section of the statute of frauds; and secondly, that the plaintiff being an infant could not sue upon it. His Lordship overruled the first objection, but upon the last he directed a nonsuit, giving the plaintiff leave to move to set it aside.

*The Attorney-General* accordingly obtained a rule nisi for that purpose, and mentioned the case of *Teed v. Elworthy (a)*.

Upon the rule coming on, Lord *Ellenborough* C. J., after referring to his report, said, that at the trial he had not sufficiently adverted to the distinction between a void contract and one which was voidable only by the infant, and that his present impression was that this was of the latter kind: and he mentioned a case of *Holt v. Ward (b)*, which was an action by an infant for a breach of promise of marriage; and after several arguments it was held that it would lie; and although the argument turned much on the peculiar nature of that contract,

(a) 14 East, 210.

(b) 2 Str. 937.

yet the Court seemed to have decided it on the general reason of the law with regard to infants' contracts.

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against  
BRUCE.

*Spankie* and *D. F. Jones*, who shewed cause, said, that *Holt v. Ward*, according to the pleadings, went no farther than to shew that an infant after he comes of age may sue on a contract made with him while an infant, and which is for his benefit, and that a promise of marriage is a contract for his benefit; but they endeavoured to distinguish the present as being a mercantile contract; and therefore in *Whytall v. Champion* (a) it was ruled that the law would not suffer an infant to trade, which might be his undoing; and for the same reason also a commission of bankruptcy shall not be taken out against him; *Exp. Sydebotham* (b), *Exp. Moule* (c). And in *Com. Dig. Infant*, C. 2. it is laid down, that regularly a contract by an infant, if it be not for necessities, shall be void. It is a rule indeed that infancy is a personal privilege of the infant, and not to be set up by others who have contracted with him in avoidance of their contract; but that is only where the contract is upon a consideration executed, or where, as Lord Mansfield observed in *Zouch v. Parsons* (d), the transaction shews a semblance of benefit to the infant sufficient to make it voidable only; but where that is left in doubt, the Court will interpose in order to protect him. Now here the contract is not upon a consideration fully executed, nor does it bear upon the face of it any such semblance of benefit to the infant, but on the contrary is open to all the objections of being a trading contract. In *Sechrogham v. Stuartson* (e), where to trespass and

(a) *Str.* 1083.(b) 1 *Atk.* 146.(c) 14 *Vel.* 603.(d) 3 *Burr.* 1308.(e) 3 *Bac. Abr.* *Infancy.* 1. 3.

assault,

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assault the defendant pleaded a licence from the plaintiff, an infant, for a sum of money, the Court upon demurrer held the contract to be absolutely void. Upon the other objection they insisted that this was a contract or sale of an interest in or concerning land, and distinguished it from *Parker v. Stanyland* (a), because there the crop at the time of sale, though it was then in the ground, had reached its full growth, and was to be taken up immediately, and so the land was considered as nothing more than a warehouse; but here the contract was at a season when the potatoes had yet to grow; and upon this distinction it was resolved in *Emmerson v. Heelis* (b) that a sale of growing turnips was "a sale of an interest in land;" and the same was held in *Crosby v. Wadsworth* (c).

*The Attorney-General*, contra, was stopped by the Court.

LORD ELLENBOROUGH C.J. As to the last objection, if this had been a contract conferring an exclusive right to the land for a time for the purpose of making a profit of the growing surface, it would be a contract for the sale of an interest in or concerning lands, and would then fall unquestionably within the range of *Crosby v. Wadsworth*. But here is a contract for the sale of potatoes at so much per acre; the potatoes are the subject-matter of sale, and whether at the time of sale they were covered with earth in the field, or in a box, still it was a sale of a mere chattel. It falls therefore within the case of *Parker v. Stanyland*, and that

(a) 11 East, 362.

(b) 2 Taun. 38.

(c) 6 East, 602.

disposes of the point on the statute of frauds. As to the other point, it occurred to me at the trial on the first view of the case, that as an infant could not trade, and as this was an executory contract, he could not maintain an action for the breach of it; but if I had adverted to the circumstance of its being in part executed by the infant, for he had paid 40*l.*, and therefore it was most immediately for his benefit that he should be enabled to sue upon it, otherwise he might lose the benefit of such payment, I should probably have held otherwise. And I certainly was under a mistake in not adverting to the distinction between the cases of an infant plaintiff or defendant. If the defendant had been the infant, what I ruled would then have been correct; but here the plaintiff is the infant, and sues upon a contract partly executed by him, which it is clear that he may do. It is certainly for the benefit of infants where they have given the fair value for any article of produce, that they should have the thing contracted for. And it is not necessary that they should wait until they come of age in order to bring the action. A hundred actions have been brought by infants for breaches of promise of marriage, and I am not aware that this objection has ever been taken since the case in *Strange*.

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DAMPIER J. The question in these cases does not so much depend upon whether the consideration is executed, as in what manner the interests of the infant will be affected by the contract. In *Knight v. Stone* (a) the Court were of opinion that an infant might submit to a reference, because it might be to his benefit; and in

(A) *Sir W. Jones*, 164. S. C. *Noy*, 92.

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*Holt v. Ward* (a) it is laid down, that where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him, as to give him an opportunity of considering it when he comes of age; and it is good or voidable at his election. But though the infant has this privilege, yet the party with whom he contracts has not: he is bound in all events.

Rule absolute.

(a) *Str.* 939.

Thursday,  
Nov. 25th.

DICKENSON, Executrix of HUNT, against  
HESELTINE.

Where bail in error was put in in vacation, and excepted to, and the plaintiff in error gave notice that they would justify on the first day of next term, and before that day non proessed his own writ of error, and the bail did not justify: Held that the bail were not entitled to stay proceedings in an action against them upon the recognizance, nor to have an exoneretur entered on the bail-piece.

THE plaintiff recovered a verdict in this action which was debt on bond, and the defendant brought a writ of error, which was allowed on the 15th of July, and on the 28th put in bail in error, who were excepted to on the 13th of August, and on the 17th the defendant gave notice that they would justify on the first day of Michaelmas term, but they did not do so, the defendant having on the 30th of October non proessed his own writ of error. The plaintiff commenced an action of debt against the bail upon the recognizance; whereupon *Espinasse* obtained a rule nisi for staying the proceedings for irregularity, and entering an exoneretur on the bail-piece.

*Lawes* shewed cause, and contended, that there was not any irregularity; that it was not competent to the plaintiff in error to vacate the recognizance by non proessing his own writ of error, but that the recognizance had

had thereby become forfeited. He admitted, that in cases where bail has been excepted to and other bail added, and the original bail have by a slip omitted to get their names struck out of the bail-piece, the Court has relieved on the ground of inadvertence, as in *Tubb v. Tubb (a)*; but there was not any such ground of relief in this case. The plaintiff in error has had the full effect of getting over the vacation; neither he nor his bail therefore are entitled to any indulgence.

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*Espinasse*, in support of the rule, relied on *Gould v. Holmstrom (b)*; and he said that the defendant in error was benefited by the non pross, and had not been delayed, or at all events, not so long as in the case cited; and yet the Court relieved the bail, on the ground that the defendant in error by excepting to the bail, considers them as no bail; and he insisted here that it could not be permitted to him to consider them as no bail for one purpose, and as bail for another.

LORD ELLENBOROUGH C. J. This appears to be a trick to get all the effect of a writ of error, without putting in bail. The pendency of a writ of error was a delay of the defendant in error, in respect of his execution.

BAYLEY J. From the 28th of *July* until the 30th of *October*, the defendant in error might have sued out execution, if there had not been a writ of error.

*Per Curiam*,

Rule discharged.

(a) 37. R. 58.

(b) 7 East, 580.



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*Thursday,*  
*Nov. 25th.***MORRIS against Sir FRANCIS BURDETT.**

A person who is nominated and elected to serve in parliament for the city of *Westminster* without being present at, or in any way interfering himself, or by his agents, with the election, or holding himself out, or authorizing any one else to hold him out as a candidate, but afterwards takes his seat in the house of commons, is not chargeable under stat. 51 G. 3. c. 126. with the expences of the hustings.

**ACTION** by the bailiff of *Westminster*, to recover from the defendant as one of the candidates at the last election of members, to serve for that city in parliament, a moiety of the expences of the hustings. At the trial before Lord *Ellenborough* C. J. at the *Middlesex* sittings after last term, it was proved that the plaintiff some days prior to the last election made the usual preparation, by the erection of hustings, &c., in expectation of a poll taking place; that on the day of nomination Lord *Cochrane* and the defendant were nominated, and afterwards declared duly elected, and returned to parliament; but the defendant never made his appearance on the hustings, nor interfered in any way himself or by his agents with the election, nor was there any evidence to shew that he held himself out or authorized any one else to hold him out as a candidate. It was proved that the defendant afterwards took his seat in the house of commons, and subscribed the test-roll required by the forms of the house to be signed upon that occasion. Upon this evidence, the defendant's counsel applied for a nonsuit on the ground that it was not proved that the defendant was a candidate within the meaning of the 51 G. 3. c. 126., under which statute it was sought to charge him with the above expences; and his Lordship upon that point was of opinion that the proof was insufficient, inasmuch as to be a candidate, a person must do some act or be privy to some act done for him, or at least assent to the proposal of himself, as an object of the suffrages of the electors;

electors; and thereupon he directed a nonsuit: but it being suggested, that the defendant by having taken his seat in the house of commons, must be presumed to have assented to his being considered as a candidate within the meaning of the act of parliament, and the case of *Morris v. Burdett* (a) being cited in support of that proposition, his Lordship although he inclined against the suggestion, gave leave to the plaintiff to move to set aside the nonsuit and enter a verdict for 22*5*l., the amount of the expences claimed.

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*The Attorney-General* accordingly obtained a rule nisi to that effect.

*Brougham* and *E. Lawes* shewed cause, and premised that in order to charge the defendant in this action, he must be shewn to be a candidate, either in the ordinary acceptation of that word, or in the sense given to it by the legislature. And they denied that in its ordinary sense it comprehended a person who is nominated and elected by others without any knowledge or concurrence on his part. And as to its legislative sense they referred to several statutes to shew that it was used in them, as implying something more than a person merely passive; as in the 18 G. 2. c. 18. s. 7. the sheriff is directed to appoint at the expence of the candidates, such number of booths as the candidates or any of them three days before the commencement of the poll shall desire; so by 7 & 8 W. 3. c. 25. s. 5. the sheriff is prohibited from adjourning the poll to any other than the usual place, without the *consent* of the candidates;

(a) 1 Camp. N. P. C. 218.

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and it is observable that the legislature have in the 7 & 8 W. 3. c. 4. (treating act) used the words "person to be elected," and not "candidate," which shews that they did not understand those terms as being synonymous. Assuming then that a person who neither interferes himself or by his agents at an election, could not in any understanding of the word be said to be a candidate, they further contended that the defendant's having taken his seat in the house of commons, could not make any difference. The taking his seat was a duty cast upon him, not a voluntary act, nor done for his own benefit; he could not legally refuse to come to parliament. By the 5 R. 2. stat. 2. c. 4. if any person summoned to parliament (be he archbishop &c., knight, citizen, or burgess) absent himself and come not (except for reasonable excuse), he shall be amerced and otherwise punished, according as of old times hath been used. By the 6 H. 8. c. 16. none shall depart from the house of commons without licence, &c., on pain of losing his wages; he may be also fined by the commons (*a*); and the king cannot grant to any man a charter of exemption to be freed from election, because his attendance is for the service of the whole realm (*b*); and there is an instance in the reign of *Philip* and *Mary* of an information being filed against *Mr. Plowden* for not attending in the house of commons. From all which it follows that the taking of his seat was not a voluntary act; and if it were not, neither shall it operate against the defendant to make that which before was without his consent, as if it were now adopted by him and done with his consent. And as to the former case

(*a*) 4 Inst. 44.(*b*) *Ibid.* 49.

of *Morris v. Burdett* (a), it will not be found that the Court there decided that the defendant by taking his seat adopted the character of a candidate, but by assenting to what had been done by his committee. Here there was not any evidence of any assent whatever.

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*The Attorney-General, Park, and Richardson* contra, contended that the meaning of candidate in the popular sense of that word, was a person who has been nominated as such, and for whom a poll is going on, and votes are given; but however that might be, such at least was its meaning within the act of parliament; which otherwise would not afford a remedy coextensive with the mischief. The mischief recited, is, that there is no convenient public building wherein to hold the election, &c., and then it is enacted that upon *every election* the bailiff shall appoint at the expence of the candidate or candidates a convenient place, &c.; so that it is clear that the legislature contemplated that at *every election* there must *ex necessitate* be a candidate or candidates; whereas, according to the argument on the other side, there may be an election without any candidate. But if that could be, how would the act of parliament be satisfied, which directs the thing to be done at every election at the expence of the candidate? Again the 2nd and 3rd sections direct the bailiff to allow a cheque book for each candidate, under pain of prosecution; it may be asked then could the bailiff have refused such book to the defendant, on the ground of his not being a candidate? Then as to the defend-

(a) 1 Camp. N. P. C. 215.

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ant's adoption of the character of a candidate by the subsequent act of taking his seat, it is answered that he was compellable so to do; but not any instance has been cited to that effect, nor will any be found in *Hatsell's Free*. The 5 R. 2. c. 4. seems to refer to persons summoned and not elected to parliament; and the 6 H. 8. c. 16. has become obsolete and cannot be drawn into precedent at this day; for since the stats. 9 Anne, c. 5. and 33 G. 2. c. 20. the law stands on a different footing, those statutes, as it seems, having enabled a person who is chosen and returned to parliament against his inclination, to vacate his seat by not complying with their requisitions (a). It appears therefore that the taking his seat was a voluntary submission to his election, and being so it amounts to an adoption of it. In the former case of *Morris v. Burdett* so far from there being evidence of any assent on the part of the defendant, there was on the contrary evidence of an express warning given on his part to the bailiff that no part of the expence would be paid by him; so that the case turned upon his adoption of the character of candidate.

Lord ELLENBOROUGH C. J. I own upon consideration of this act of parliament, I cannot bring myself to doubt what is the natural sense and meaning of the word candidate, as it is used by the legislature. The legislature has directed that convenient booths shall be erected by the bailiff for holding the election; and there can be no doubt that they assumed that upon every occasion of an election there would be found a candidate

(a) 1 *Dough on Elections*, 283. n.

or candidates in the ordinary sense of that word, that is, persons offering themselves to the suffrages of the electors. That I take it is, strictly speaking, the correct sense of the word candidate. Therefore a person cannot be in that sense of the word a candidate by the mere act of others, who propose him without his assent. The legislature, indeed, assumed that it would always be the case of every person who should be proposed, that he would be so far assenting as to answer the description of a candidate; and therefore they thought it sufficient to impose the burthen of recompensing the bailiff on persons answering that description. But a case has arisen not within their contemplation; for here there is not any evidence that the defendant tendered himself in any way as the object of choice; but he was merely passive; the electors of themselves having brought him forward without any consent on his part. The question then is, whether the legislature intended to throw on such a description of person, whom we must take to be an unwilling candidate, the charge of making this reimbursement. The legislature have not so said; they have said only that the expences shall be defrayed by the candidate, that is, by the person who offers himself. And really there might be infinite hardship in imposing this burthen on any others. Suppose a person from motives of spleen or in a jest should think fit to put forward another as a candidate, shall it be in his power to cast so heavy a burthen on the other, because he may choose to indulge his malice or pleasantry? I do not see any thing in the act of parliament, which makes it susceptible of a construction leading to so mischievous a result, or which affords a reason for extending the word candidate beyond its ordinary

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ordinary import. The stat. 18 Geo. 2. c. 18. s. 7. enacts that the sheriff shall erect such number of booths at the expence of the candidates, as they or any of them shall desire; which is different in that respect from the present act; for here the act imposes the duty on the bailiff in the first instance, and says that it shall be at the expence of the candidates. If there be no candidates the burthen rests with the bailiff. This may be a hardship, but we cannot, because the legislature have imposed an onerous duty on the bailiff, strain the meaning of the word candidate beyond its fair import, in order to throw the burthen of that duty upon others. As to the inference which is afforded from the defendant's having taken his seat, every person who is returned to parliament is bound by the law of the land to serve; and it has been argued, and seemingly upon probable grounds, that he may be compelled to serve. Several statutes have been cited to that effect, which subject persons to penalties for non attendance in parliament; and although subsequent statutes may possibly have enabled them to evade the duty by refusing to take the oaths required, such refusal would be criminal if done, not on account of scruples of conscience, but for the sake of evasion only; and it should seem that in every case where a person is called upon to perform a public duty, he is liable to be punished for refusing to perform it. To instance in one particular only, a serjeant at law is liable to punishment, for not taking upon himself that degree after being called thereto by the king's writ (a). Upon the whole then, it appears to me that this defendant was not a

(a) See 2 Inst. 214.

candidate within the true meaning of that word; having never acted as such, nor in anywise, either directly or indirectly, assented to becoming a candidate. If there had been any evidence of acts, which might have amounted to an adoption of that character, it would have been different.

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LE BLANC J. The question is, in what precise sense the legislature has used the word candidate; and that will depend very much on a consideration of the nature of the charge imposed by the act of parliament. The act imposes a duty on the public officer of providing a convenient booth or place for holding the election, and it directs that this shall be done at the expence of the candidate. The question then is, whether the act intended to charge with this burthen a person who did not consent to take upon himself the character of a candidate. It has been argued, that a candidate means a person for whom votes have been given. This argument pushed to the extreme, would of course comprehend every individual in whose favour one single voter only had given his suffrage without his knowledge or consent; and would put it in the power of a stranger to subject any person to the expences of the hustings. This to be sure is an extreme case, but still it might be so if the argument be good. It is more probable, however, that when the legislature used the word candidate, it did not occur to them that a case of a person having votes given for him, or one like the present, of a person being returned to parliament, without his knowledge or consent, might possibly happen. This latter is also another extreme case; and it is probable that the legislature used the term candidate in its ordinary



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ordinary acceptance, and not with a view to any such extreme cases. We are then to decide whether in such a case the person be liable. I take it for granted, that there was not any evidence of any act done by the defendant to shew that he had adopted the character of a candidate. This has been likened to the case from *Campb. N. P. C.*, where the Court refused a rule for setting aside the verdict. The distinction however has already been pointed out. There it appeared that *Percy*, who was said to be an agent for some purposes on the behalf of the defendant, had done an act by requiring tickets for the hustings, which act, if done on his behalf, might be considered as an act of adoption by the defendant; therefore it was properly left to the jury to say whether the defendant had not virtually undertaken to defray a part of the expence as candidate; and the jury found that he had. Nothing, however, of that sort exists in this case. There is another question, whether a person who has been returned to parliament without his knowledge and consent shall be considered as having adopted the character of candidate because he afterwards takes his seat in the commons house. As to that, I cannot but think that it is the duty of every person who happens to be returned, and who is under no disabilities, and can conscientiously take the necessary oaths, to submit to such election and take his seat, and contribute to the public exigencies by giving his assistance at the grand council of the nation. I will not pretend to say whether a person is or is not compellable to take his seat; but I cannot consider his obeying a public call as a voluntary act on his part, by which he must be supposed to adopt a burthen imposed;

I there-

I therefore cannot see any reason for setting aside this nonsuit.

BAYLEY J. This may be possibly a hard case on the plaintiff, but nevertheless I cannot say on the construction of this act that the defendant falls within the meaning of the word candidate. It very rarely happens that an election takes place in which there is not one or more candidates in the general and popular sense of that word; by which I understand a person who is desirous of obtaining the suffrages of the electors, and holds himself out for that purpose. The act imposes the duty on the bailiff at the expence of the candidate or candidates; therefore if there be any one candidate, the bailiff will be reimbursed his expences; but before he can be so, he must find a person to answer the description of candidate. It has been said, that every person in whose favour a poll has been demanded and is proceeding, or who has been nominated, must be considered as a candidate. I do not agree to that position; for we well know that in many instances persons have been nominated and had votes given for them without their knowledge and concurrence. It has sometimes happened that some electors, in order to mark a powerful predilection, have thrown away their votes by giving them to some person of high public eminence and character, who has not any concern with the election; and the sheriff is bound to receive these votes. If such a person is to become a candidate by these means, he would also become liable for these expences. And unless the definition of candidate is extended to all persons for whom a vote may be given, I know of no other restriction except that which confines it to such person as shall

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shall be desirous of obtaining votes, and shall hold himself out for that purpose; or shall afterwards, by his acts, adopt the character of a candidate. It is said that here the defendant has adopted this character by afterwards taking his seat in the house of commons. I consider however that his taking his seat was in discharge of his public duty; and not a matter of choice, by which he can be said to have adopted the acts of those who elected him. It was his bounden duty to take upon himself this public function.

DAMPIER J. I cannot consider that the taking his seat was an adoption of the acts previously done so as to make the defendant a candidate within the meaning of this statute. That was only done in discharge of a great public duty, and it matters not whether the defendant was compellable or not to take his seat. It was his duty to take the oaths, if he had no conscientious scruples, and to give in his qualification, if he had one. The question therefore is reduced to the construction of the act. Probably it was the intention of the legislature, when they cast a burthen on the returning officer, that he should be reimbursed in all cases. That might be so; and if upon every occasion of an election there must be a candidate, it would necessarily be so. I apprehend however that there is not any necessity that there should be a candidate; and here, according to the ordinary understanding of that word, viz. a person offering himself as an object of choice, or acquiescing in the proposal of others, there was not any evidence of there being a candidate. It might happen, though it is not probable, that an election might take place without any person offering himself, and both

members might be returned without their consent; but the question here is, whether the term candidate can be extended to every person for whom a vote is given pending the poll. I think not; for that would be opening a door to mischievous consequences. A person in unequal circumstances might be nominated and returned, and thereby subjected to very heavy expences. It is true, that if he be returned, he is bound to take the public duty upon himself; and he ought not therefore to be subjected to expence, unless the statute is imperative upon him. It seems to me, however, that there is not any thing in this act nor in the other acts to extend the meaning of the word candidate beyond its ordinary import, which is one who voluntarily proposes himself, or adopts the proposal of others.

Rule discharged.

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against  
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**The KING against The Collector and Comptroller of the Customs at LIVERPOOL.**

Friday,  
Nov. 26th.

A Rule nisi was obtained for a mandamus to the defendants commanding them to grant a certificate of registry, pursuant to stat. 34 G. 3. c. 68. to *R. Griffith*, and seven other owners of a vessel or flat, called the *Supply*. In January 1801, the vessel was duly registered at *Liverpool*, in the names of *S. Affleck* merchant, *T. Pickering* merchant, and *J. Pickering* merchant, as owners. On the 5th of April 1806, *Affleck* sold and transferred his share to the *Pickerings*, and the transfer was indorsed upon the certificate of registry to *T. and J. Pickering*, merchants of *Liverpool*, and entered

The Court refused a mandamus to the officers of the customs to register a ship transferred by the survivor of two part-owners, merchants, on the ground that the executors of the deceased part-owner ought to have joined in the transfer.

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entered at the customs at *Liverpool*. Afterwards *J. Pickering* died; and *Griffith* and the seven others agreed with *T. Pickering*, as the surviving partner, for the purchase of the vessel; and on the 16th of March 1812 the vessel, by bill of sale in writing, reciting the certificate of registry and indorsement thereon, was conveyed by *T. Pickering*, as such surviving partner, to *Griffith*, and the seven others, who paid the purchase money, and an indorsement of such transfer was made by *Pickering* upon the certificate of registry. *Griffith* applied to the collector and comptroller to register this transfer, which they refused to do, upon the ground that the executors of *J. Pickering* had not joined in it.

*The Attorney-General, Park, and Roe*, shewed cause, and contended that the two *Pickerings*, being part owners of this ship, as merchants, were tenants in common of their respective shares, and consequently that upon the death of one his share went to his personal representatives, and not to the other by survivorship; and so they said the executors of *J. Pickering* ought to have joined. And the officers empowered to make registry, are authorized to call for the bill of sale (a), and to see that there are proper parties to the transfer before they make registry.

*Scarlett* contra, took a distinction that here the ship was originally built, and registered in the names of *Affleck* and the two *Pickerings*, and not conveyed to them as partners; and he said that even upon a conveyance to them as partners, it might be doubtful whe-

(a) 34 G. 3. c. 68. s. 20.

ther they would take as tenants in common, unless it was conveyed to them as such. The survivor may be bound to account in equity with the executors, but he may release the whole.

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LORD ELLENBOROUGH C. J. The officers of the customs have a right to see that the property is legally in the person applying for the registry. These persons apply as purchasers from the survivor, who as such was not entitled to make the transfer, for there is no survivorship in this case, but the share of the deceased partner goes to his representatives.

BAYLEY J. There is not any survivorship among traders.

DAMPIER J. The survivor has not the legal title; the remedy survives, but not the legal title. The rule is that the remedy survives, but not the right. By the usage the person who has not the right has the remedy. It is an anomaly. He may release the remedy, but not the right.

*Per Curiam,*

Rule discharged.

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## JOHN WILLIAM EDEN'S Case.

A return to a habeas corpus for the discharge of an apprentice above the age of 21, stating the custom of London, that every citizen and freeman of the city may take as an apprentice any person above the age of 14 and under 21, to serve for 7 years and more, must shew that the apprentice was within those ages when he bound himself apprentice; for the Court will not intend that from matter dehors the return.

The Court refused leave to amend the return.

Quære, whether an apprentice by the custom of London is compellable to serve after 21?

ON a former day in this term, *Bolland* shewed cause against a rule for a habeas corpus, directing a person of the name of *Gambert* to bring up the body of his apprentice *J. W. Eden*, in order that he might be discharged, upon an affidavit that he had attained the age of 21 years on a day past. He relied on the custom of London, by which he said apprentices that are bound by indenture above the age of 14, and under 21, are compellable to serve the full term, though that may extend beyond their age of 21; and gave as an instance the usage of the apothecaries' company, to bind their apprentices for eight years; which as they could not be bound before 14 would necessarily extend their apprenticeships to the age of 22 at the least. And for the custom he referred to *Bohun's Priv. Lond.* (a) and *Stanton's case* (b), and also to *Code v. Holmes* (c), where the recorder certified this custom; since which time it had never been doubted.

*Gurney* contra, denied that such a custom had ever been certified, or that it could exist without being highly inconvenient; for if the apprentice were liable beyond 21 he might be liable as Lord *Kenyon* observed in *Ex parte Davis* (d) till the age of 50 or upwards; but by the general rule of law, an apprentice may elect to vacate his indentures at 21, and therefore if such a

(a) *Tit. Chamberlain's Court.*(b) *Moor*, 135.(c) Cited in *Horn v. Chandler*, 1 *Mod.* 271. *S. C. Palmer*, 361.(d) 5 *T. R.* 716.

custom had been certified, it would not be good because it would be unreasonable. *Stanton's* case, only decided that the apprentice could not plead infancy, that is, that by the custom of *London* an infant might bind himself by indenture, but not that the master might detain him after 21.

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*The Court* said that the custom as it was assumed to be was very general, and that it ought to appear on the return in its proper terms, and with the limitations belonging to it; and for that purpose they made the rule absolute,

And now on this day the return was read, and stated that on the 3d of *May* 1809 *J. W. Eden* bound himself apprentice to *Gambert*, (describing him as of *Duke Street, Covent Garden*,) a freeman and citizen of *London*, by indenture according to the custom of the city to learn the art of a goldsmith and jeweller, from the day of the date of the indenture for seven years thence next following, and set forth the indenture in hæc verba, which was in the usual form, and alleged that the said indenture was duly inrolled at the office of the chamberlain of the said city, within the first year of the term of the said apprenticeship, according to the custom of the said city. The return then proceeded to state, that there is, and from time immemorial hath been within the city of *London*, a certain ancient and laudable custom used and approved, that every citizen and freeman of the said city hath a right to take, and for the whole time aforesaid hath been used and accustomed to take as an apprentice, any person born within the kingdom of *England*, above the age of fourteen years and



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*under the age of twenty-one years, by indenture to be made between the said apprentice on the one part, and the said citizen and freeman on the other part, to serve the said citizen and freeman of the city aforesaid for the term of 7 years and more, according to the obligation of the said indenture; and such apprentice as aforesaid, by the custom of the aforesaid city from time immemorial, is held and bound to serve the said citizen and freeman his master for the whole time of his apprenticeship in the said indenture mentioned and contained, and well and faithfully to perform all reasonable covenants in the said indenture contained on his part to be performed in respect of the true, just, and faithful service of the said apprentice to his said master during the term of his aforesaid apprenticeship, according to the true intent and meaning of the said indenture, as fully and completely as if the said apprentice at the time of the making the said indenture had been of the full age of 21 years or more; and if the said apprentice shall break any of the covenants contained in the said indenture on his part to be performed during the term of his apprenticeship contained in the said indenture, that then the master of such apprentice shall have the like remedy against the said apprentice as he might have had if such apprentice at the time of the making his aforesaid indenture had been of the full age of 21 years and more, which said custom was certified to his majesty's Court of King's Bench at Westminster in Easter term, in the 21st year of the reign of King James the 1st, by the recorder of the said city.*

*Gurney* objected to the return, that it stated the custom incorrectly in two particulars; 1st, according to the

the precedents of pleadings in *Bohan Priu Lond.* the custom seems to be confined to citizens resident within the city; and if so, the return ought to have stated it, and have alleged farther, that the master was resident within the city; the contrary of which appears by the description in the indenture. 2dly, The custom, according to *Horn v. Chandler (a)*, is confined to such apprentices as are infants unmarried when they bind themselves. He also objected upon the custom as returned, that the return did not bring the apprentice within it, inasmuch as it omitted to shew that he was above the age of 14 and under 21 when the master took him as an apprentice.

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*Bolland*, contra, answered to the two first objections, that the return was framed according to the custom, as it was certified in *Code v. Holmes, Palmer*, 361. where no such restrictions as contended for are to be found. Upon the last objection he contended, that it was unnecessary to state expressly upon the return, that the apprentice was between 14 and 21 at the time of his binding, because that appeared by comparing the date of the indenture with the day on which he came of age, which was stated in the affidavit.

But *The Court*, upon the last point, said, that this was matter which could not be left to intendment; but ought to have been made the subject of distinct and positive allegation.

(a) 1 Mod. 271.

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*Bolland* then prayed to amend the return in this respect, but the Court refused leave, saying they had never known an instance of amending a return of this sort.

Return quashed.

Saturdays,  
Nov. 27th.

An appeal to the next sessions after an inclosure made by virtue of an inquisition taken on a writ of ad quod damnum is too late, if those sessions be not the next after the inquisition taken and entered and recorded at the sessions; therefore where the sessions dismissed such appeal as being out of time, this Court refused a mandamus to them to enter continuances, &c.

### The KING against The Justices of Bucks.

THIS was a rule for a mandamus to the defendants, commanding them to enter continuances to their next general quarter sessions for the county of *Bucks*, upon the appeal of *John Bennett* and *Thomas Stone* against the inclosure, by virtue of an inquisition taken upon a writ of ad quod damnum, of a certain road therein described. It appeared by the affidavits on which the rule was obtained, that the inquisition was taken at *West Wycombe* in the said county on the 11th of Nov. 1812, but that no inclosure or stoppage of the road took place before *June* 1813, when about the first of that month a painted board was put up at the commencement of the road, and a gate across it locked. The board was dated the 20th of *April* preceding, and gave notice that by virtue of a writ of ad quod damnum and inquiry before the sheriff and a jury of the county, the road in question was stopped. On the 2d of *July*, *Bennett* and *Stone*, as inhabitants of the parish of *Radnage*, gave notice of their intention to appeal against the said inclosure to the next sessions, and their appeal accordingly came on to be heard at the last *Midsummer* sessions, but the sessions dismissed the appeal, thinking it out of time.

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In answer to the rule, it was sworn by the attorney of the person who sued out the writ of *ad quod damnum*, which was tested on the 28th of *July* 1812, that at several times prior to and also between the teste of the writ and the taking of the inquisition he conversed with *Bennett* on the subject of the intended inclosure, and requested him to attend at the time and place where the inquisition was to be taken. That the jury who attended at the taking of the inquisition were all resident in and about the immediate vicinage of the road in question, and were substantial yeomen and farmers, and others acquainted with the road, and had a plan of the road submitted to them, and went from *West Wycombe* to view the same, and traversed it from the beginning to the end before they returned and gave their verdict. That the writ and inquisition were entered and recorded at the ensuing *Epiphany* sessions, and the plan deposited with the clerk of the peace.

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*The Attorney-General, King, and Bligh* shewed cause against the rule, and contended that the appeal was too late, and should have been at the latest to the preceding *Easter* sessions, which were the next after the recording of the inquisition; from which time the proceeding became a matter of public notoriety; and they referred to stat. 13 G. 3. c. 78. s. 19. and to *Rex v. Justices of Pembroke-shire* (a), for the construction of that section as to the time of appealing; and insisted that the statute had made no difference in this respect between an appeal against an order of justices and one against an inquisition under a writ of *ad quod damnum*. In neither case does the

(a) 2 East, 213.

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statute refer the time of appealing to the next sessions after the inclosure or stopping up of the road, but to the next sessions after the order made or proceeding had; which expressions must have been intended to apply respectively to an order of justices, or proceeding by inquisition. That the inclosure was not the thing to be appealed against, they said, was evident from the act going on to provide "that if no appeal be made, or if upon appeal the order and proceedings be confirmed, the inclosure may be made." Unless the next sessions after the proceeding had means after the inquisition taken and recorded, it is difficult to say to what period an appeal might not be deferred. And they referred to stat. 8 & 9 W. 3. c. 16. s. 2. (a), (repealed), and to *Ex parte Vennor* (b), where the appeal which was founded on that clause of the act was made to the next sessions after the inquisition and before inclosure, and Lord Hardwicke held that to be according to the direction of the act; and his construction of that clause will serve as an exposition of the present, the two clauses being *in pari materia*, and very nearly in the same terms. Lord Hardwicke also said, that "the statute has put the justices in the place of the traverse;" and since before

(a) 8 & 9 W. 3. c. 16. s. 2. enacted, "that where any common highway at any time hereafter shall be inclosed after a writ of *ad quod damnum*, and inquisition thereupon taken, it shall and may be lawful to and for any person or persons injured or aggrieved by such inclosure to make their complaint thereof by appeal to the justices at the quarter sessions to be held for the same county next after such inquisition taken, who are hereby authorized and empowered to hear and determine such appeal, and whose determination therein shall be final; and if no such appeal be made, then the inquisition and return entered and recorded by the clerk of the peace of such county at the quarter sessions shall be for ever binding to all persons whatsoever, without any farther or other appeal, any law or statute to the contrary notwithstanding."

(b) 3 *Atk.* 766.

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the statute the party might have traversed the inquisition upon the return *ad nullius damnum*, for then the king might licence the stopping up of the ancient highway (a), by the same rule the party may appeal. As to any objection on the ground of surprize or want of notoriety, it appears that one of the parties had notice before the inquisition was executed; and the inquisition itself is a public and notorious proceeding, and before it is returned into Chancery, it is entered and recorded at the sessions. The practice is for the sessions to keep it till the time of appeal is out, and then return it with an indorsement that there has been no appeal.

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*Best contra* contended, that though the statute directed the party to make his complaint to the next sessions after the proceeding had, it also directed that the person appealing should be aggrieved by the inclosure; so that the whole must be taken together; that is, either the word proceeding must be taken to mean inclosure, or the appeal must be at the next sessions after the proceeding had and the inclosure; for until the inclosure there is no grievance, and the party appellant must be some one aggrieved by the inclosure. And he relied on *The Queen v. Ogden* (b), which had given a similar construction to the 8 & 9 W. 3. c. 16. s. 2. which is admitted to be similar. He also urged that the inquisition was only for the information of the crown to ascertain whether the crown might proceed to licence the inclosure, and not the thing by which the party was aggrieved; and that it did not appear that the parties here had any notice of its execution, or of any thing being

(a) *Faugh. 341. Thomas v. Sorrell.*(b) *7 Mod. 45.*

done,

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done, before the time when the inclosure was made. And as to *Rex v. Justices of Pembrokeshire*, he said that was different, because in the case of an order of justices the act expressly enables the person aggrieved by the order, not by the inclosure, to make his appeal.

Lord ELLENBOROUGH C. J. The reason and convenience of the thing, without adverting to the statute, would suggest that the time within which the appeal ought to be made should rather be taken from the date of some order or proceeding made, which is certain, than from that of an act in pais, which is uncertain both in its commencement and termination, and which would make the period of appeal as it were in abeyance until the act were actually done. The convenience of the thing therefore seems, I think, to require a certain date, and would incline one to adopt that construction which would give one which is certain rather than one which is uncertain. Then adverting to the words of the act, though perhaps they are not quite clear from inconsistency, still I think proceeding must be taken to mean legal proceeding, and not an act done. In general, where an act done is meant, the act of parliament expresses it so, by the words proceeding or act done; the word proceeding does not import an act done, it has more properly a sense applicable to legal proceedings; we say, *taliter processum est*, in the language of pleading, as meaning a proceeding in a course of justice. What are the words of the act? "It shall be lawful for any person injured or aggrieved by any such order or proceeding." Nothing has been hitherto mentioned but an order of justices; therefore order or proceeding here is tantamount to order of justices and such proceeding

ceeding connected with it, as makes a part of the judicial proceeding. The act goes on, "or by the inclosure of any road or highway by virtue of any inquisition taken upon any writ of ad quod damnum." A person may be said to be aggrieved by the inclosure by virtue of an inquisition before the inclosure is actually made. The order to inclose under the inquisition is a grievance. An order which arms another with a power to stop up or inclose is a grievance in point of law to him whom the inclosure or stoppage would aggrieve, by the very authority which it confers.— "To make his complaint by appeal to the justices at the next quarter sessions after such order made or proceeding had." Here the words embrace the whole subject matter of appeal; the appeal may be to the next sessions after the order, i. e. the order of justices, or proceeding, which I think is referable to the new matter, i. e. the proceeding under the writ of ad quod damnum. And the act goes on, "that if no such appeal be made, or such order and proceedings shall be confirmed, the said inclosures may be made and the said ways stopped," which thereby shews that the appeal was to precede the inclosure or stoppage; and it adds, that the inclosures shall not be made until the new highway shall be completed; therefore if there be no appeal until the inclosure, the party must in every case make a new highway before it can be determined whether he is at liberty or not to stop up the old one. "Proceeding" then cannot mean proceeding to stop up or inclose, but the proceeding upon the inquisition. This construction affords a clear and certain time for the appeal in cases of inclosure by virtue of an inquisition upon a writ of ad quod damnum; and all objection is removed on the ground of there being a want of that notoriety

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notoriety in this proceeding which might be wished; for we find that by the practice of the sessions as much notoriety is given to it as the thing is susceptible of, though there does not seem to be any authority for the practice given by this act of parliament. The sessions intercept the writ, and indorse it with extraneous matter, if I may so say, as a substitute convenient enough where the act has made default. It seems to me that the appeal must be made to the quarter sessions next after the execution of the inquisition; for there would be no certainty if the appeal was to be delayed till some act of inclosure were done, by putting the spade into the ground or by other means; whereas the fair construction of the act obtains that certainty which is so desirable.

LE BLANC J. The difficulty arises from the two words "inclosure" and "proceeding," which words, however, when they come to be considered, will not leave any very great difficulty as to the construction which the Court ought to give them. The proceeding by writ of ad quod damnum is an ancient one, and well known to the law. The stat. 8 & 9 W. 3. clearly used the term inclosure in the sense of directed to be inclosed; for it enacted that where any highway should be inclosed after a writ of ad quod damnum, and inquisition thereon, it should be lawful for any persons aggrieved by such inclosure to make their complaint by appeal to the next quarter sessions after such inquisition taken; therefore it is clear that the statute meant persons aggrieved by the order for inclosure in pursuance of the inquisition under the writ of ad quod damnum. It further enacted that the sessions should  
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hear and determine such appeal, and that their determination should be final; and if there should not be any such appeal, the inquisition and return entered and recorded by the clerk of the peace at the sessions should be for ever binding on all persons; so that here an authority was given to have the inquisition and return carried to the clerk of the peace, and entered and recorded. After that statute comes the 13 G. 3. c. 78. s. 19., which authorizes two or more justices at special sessions to do that by their order, in a more summary way, which before was done by an inquisition on a writ of *ad quod damnum*; and as to the appeal it enacts that "it shall be lawful for any person aggrieved by any such order or proceeding," which means an order of the justices; "or by the inclosure of any road by virtue of any inquisition," borrowing the very expression from the 8 & 9 W. 3., "to make his complaint by appeal to the justices at the next sessions after such order made or proceeding had." "Such order or proceeding:"—here proceeding must be understood in a sense analogous to order, that is a legal or judicial proceeding, and not an inclosure made in execution of such proceeding; and that such is its sense is confirmed by the subsequent part of the clause, "that if no such appeal be made, or being made, such order and proceedings be confirmed, the said inclosure may be made, and the proceedings thereon shall be final." It is manifest therefore that this act as well as the act 8 & 9 W. 3. contemplated that the appeal was to be made before the inclosure. And what has been already alluded to by my lord, that no inclosure is to be made until the new highway shall be completed, leads to the same conclusion; for one cannot suppose that the legis-

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lature meant to put the party to all the expence of completing a new highway, before it could be determined whether he was entitled to inclose the old one. It seems to me therefore that the term proceeding may refer either to the order of justices or to the inquisition on a writ of ad quod damnum, and that the appeal must be made against that, and not against the inclosure. If a contrary construction were held the consequence would be that an order of justices would be final, if there were no appeal to the next sessions after the making such order, but that under the same circumstances an inquisition upon a writ of ad quod damnum, which is matter of greater notoriety than the other, would not be final; and the party aggrieved could not appeal against it, until after the new highway was set out and completed, and the inclosure of the old one was made. That as it seems to me would be an inconsistent construction; and therefore in this case the inquisition entered and recorded at the sessions, and not the inclosure, was the thing to be appealed against.

*Per Curiam,*

Rule discharged.

Saturday,  
Nov. 27th.

WARD against BRUMFIT and EASTWOOD, Bail  
of RHODES.

A return by  
the sheriff of  
non est inven-  
tus procured by  
the plaintiff  
against the

THIS was a rule nisi for setting aside several writs of scire facias, and subsequent proceedings against the bail for irregularity, and for restoring to them principal, in order to ground proceedings against the bail, is irregular, if the principal be at that time in custody of the same sheriff on a criminal charge; and the Court set aside the proceedings against the bail with costs where the plaintiff knew that the principal was in such custody at the time of such return.

61*l.* 10*s.* 6*d.*, levied under the execution against them.

It appeared by the affidavit in support of the rule, that the plaintiff sued out a ca. sa. against the defendant in the original action, directed to the sheriff of *Yorkshire*, and procured the sheriff to return non est inventus, although the defendant was at that time to the knowledge of the plaintiff in the actual custody of the said sheriff; that thereupon the proceedings against the bail were grounded and the monies levied.

*Gaselee* shewed cause upon an affidavit, which stated that at the time of this return, the defendant in the original action was in custody of the sheriff in *York* castle, upon a criminal charge of forgery, and not under civil process; and he relied upon this difference of fact as distinguishing the case from *Forsyth v. Marriott* (a), and *Burks v. Maine* (b), where the parties were in custody on civil process.

But *The Court* said that the sheriff was the gaoler; upon every change of sheriff the prisoners were turned over to the custody of the new sheriff; and that if he was bound to take notice in one instance, he was bound in all. And upon the application of *Gaselee*, that the rule might not be made absolute with costs; they said that as the plaintiff did not deny the knowledge, he must pay the costs.

*Littledale*, was in support of the rule.

Rule absolute.

(a) 1 *N.R.* 251.

(b) 16 *East*, 2.

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if no other ship can be procured to carry it to its port of destination. They then commented on the facts of the present case, in order to show that it coincided with the above proposition in every particular. The ship received a damage within the policy, which damage could not be repaired in time for her to proceed on the voyage, and the voyage was thereby completely lost, and no other ship could be got. They urged that this was a contract of indemnity, not merely on goods, but on goods for a particular voyage, that is, that the ship should reach *Quebec*; and as there was a known course and period for performing such voyage, it was implied in the contract that the voyage should be performed within such period, or at least within a reasonable time. In *Manning v. Newnham* (a), Lord Mansfield said, that where the ship could not perform her voyage, the assured were not to wait until ships could be had. And the same may be said here; if the assured were bound to wait, they might have to wait an indefinite time; and it appears here that even if they could have procured a ship instantaneously, the voyage would not have been saved, for the season was gone by. As to the warranty against particular average, nothing more was intended by it than to protect the underwriter from a partial damage of the cargo, but not to exclude a loss occasioned by a complete failure of the voyage. In *Manning v. Newnham* there was a similar warranty; and there also the cargo still subsisted in specie, and had not sustained a more extensive damage than here; yet it was held that the assured might aban-

(a) 2 *Marsh* 111 on this page.

don and claim a total loss. To that decision Lord *Ellenborough*, assented in *Wilson v. Royal Bank Ass. Company*, and would have acted upon it in that case, had it not appeared that there was a vessel in which the cargo might have been sent on. So in *Dyson v. Rowcroft* (a), the cargo, which was within the usual memorandum, though greatly damaged, was not destroyed by salt water, but by corruption, but still it might be said to subsist in specie; nevertheless, it was holden to be a total loss. And the reasoning of the Court in *Martin v. Crokatt* (b) applies to this case; Lord *Ellenborough* C. J. there said, if, upon the happening of such a peril, which suspends the voyage, and induces the necessity of repair, the owners choose to make it a total loss, upon the loss of the voyage, they ought to give notice of abandonment. So in *Dary v. Milford* (c), his language is, that "where the thing subsists in specie, there must be an abandonment;" and in both those cases, there was a warranty like the present, but there was no abandonment. Here, by reason of the abandonment, it became a total loss with benefit of salvage.

*Thompson* and *Richardson*, contra, said, that without the help of some decision it would be difficult to maintain, that a person who contracted to be liable in case of a total loss of the thing insured, with an exception from partial loss, was liable in respect of an considerable damage sustained by the thing, the thing itself still subsisting in specie. But they admitted

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(a) 3 B. &amp; P. 474.

(b) 14 East. 466.

(c) 15 East. 559.

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that there were cases, and particularly that of *Manning v. Newnham*, which shewed, that under certain circumstances that might happen. They denied, however, that such was the present case. Here it could not be said, as in *Manning v. Newnham*, that the voyage was lost and gone, for it was only suspended for the season; there was not a total incapacity of performing the voyage at any time, but only at the particular time; the ship might have performed it after she was repaired; in *Manning v. Newnham* she could not be repaired at all. Here, therefore, was only a delay, but not a loss of the voyage; which distinguishes it from that case, without contending that the assured were bound to wait an indefinite time. According to the argument, however, on the other side, if the ship be damaged so as to require repair, which delays her beyond the season, that is a total loss of the goods, though the goods have not sustained any damage whatever. But in *Dyson v. Rowcroft* (a), the language of Lord Alvanley is different; he said, that unless the consequence of the damage were the total loss of the commodity, the underwriter did not agree to be liable; but in that case the consequence was a total loss; and *Parsons v. Scott* (b) shews that a loss of voyage does not necessarily constitute a total loss. In *Martin v. Crockatt*, and *Davy v. Milford*, as there was no abandonment the point now in question did not arise; and in *Wilson v. Royal Exchange Ass. Company*, though Lord Ellenborough acceded to *Manning v. Newnham*, it is observable that there the cargo was perishable, and not as here, of a quality which could not be deteriorated by delay.

*Clerk adv. vult.*

(a) 3 Bos. & Pull. 476.

(b) 2 Tunn. 363.

LORD ELLENBOROUGH C. J. now delivered the judgment of the Court in substance as follows:

This was a motion for a new trial in an action which was tried before me upon a policy of assurance "at and from *London* to *Quebec*;" and the loss was alleged by perils of the seas. The insurance was on the cargo warranted free of particular average, and the cargo consisted of copper, iron, and nails. The ship with her cargo on board, sailed from *London* on the 16th of *September* 1811 for *Quebec*, and encountered heavy gales, so that the ship making much water and being in a bad state, the master on the 20th of *October* was obliged to make for the nearest port, which was *Kinsale* in *Ireland*, and arrived thither on the 25th of *October*. On the ship's arrival there she was found to be in a state to make it necessary for her to undergo repairs. The repairs were accordingly set about, but she could not be repaired in time to prosecute her voyage that season, the repairs not being finished until the *March* following. There was not any ship at *Kinsale* or *Cork* to be procured to forward the cargo. The cargo was damaged, and sold as a damaged cargo; and notice of abandonment was given on the 9th of *November* by the assured, two days after they had received notice of the damage; but the defendant refused to accept it. The question is, whether this was a total loss of the cargo under all the circumstances, or only an average loss; for if the latter, as the underwriter is free from particular average, the plaintiffs are not entitled to recover. The plaintiffs were allowed to take a verdict at the trial, subject to a motion by the defendant. In this case the loss in fact was an average loss by the damage arising

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from the sea-water to the iron and nails for the space of five or six weeks during which they were on board. The copper was not injured at all; and the iron and nails not to any considerable extent. The ship was under a temporary disability; though the means of repairing were no doubt easily attained at so commodious a harbour as *Kinsale*, and it does not appear that the necessary repairs could not have been done before *March*. However it appears that she could not be repaired in time for her voyage to *Quebec* that season. The voyage is made in about seven or eight weeks, and in *November* the river *St. Lawrence* becomes frozen so that *Quebec* is inaccessible by ships by the 28th of *November*. It does not appear that any extraordinary pains were used by the captain to get another ship; it is stated indeed that there were none at *Kinsale* or *Cork*. This then is a case where there was not an actual loss of the cargo or the ship, but only of the voyage for that season; and the question is, whether such a loss amounts to a total loss of the cargo by reason of the abandonment. Assuming that the case of *Manning v. Newnham, Marsh. Ins.* 585. was well decided, and that a total loss would be recoverable for a cargo insured, as in that case, free of particular average, and situated under the same circumstances, it may be observed that there the ship had received an irreparable damage, as it is stated in the report, which drove her back to *Tortola*, where only two ships could be had, both together not capable of taking the cargo on board; so that that case is widely different. The damage to the ship is there stated in terms to be irreparable; that distinguishes it; for here not only was the damage not

irre-

irreparable, but it appears that it could be, and was, repaired in a few months. In that case the cargo became in effect extinct; the ship no longer subsisted, nor could it be conveyed at all in any ship: here the cargo was capable of being conveyed after a delay of a few months only in the very same ship. The only description of loss therefore capable of sustaining an abandonment so as to convert what was in fact an average into a total loss is a temporary suspension of the voyage. But what case has ever yet decided that such a temporary retardation is a good cause of abandonment, so as to amount to a total loss? Disappointment of arrival is a new head of abandonment in insurance law. If wherever a disappointment were to arise an abandonment might be made, then supposing this ship had sailed on her voyage, but had not arrived in the river *St. Lawrence* until after the frost set in, and was consequently obliged to wait there until the next season, that would have been a cause of abandonment according to this rule. It would be a loss of the voyage which the assured had in contemplation. So if the retardation of the voyage be a cause of abandonment, the happening of any marine peril to the ship by which a delay is caused in her arrival at the earliest market, would be also a cause of abandonment. I am well aware that an insurance upon a cargo for a particular voyage contemplates that the voyage shall be performed with that cargo, and any risk which renders the cargo permanently lost to the assured may be a cause of abandonment. In like manner a total loss of cargo may be effected not merely by the destruction of that cargo, but by a total permanent incapacity of the ship to perform the voyage. That is

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 against  
 WALLIS.

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ANDERSON  
against  
WALLIS.

a destruction of the contemplated adventure. But the case of an interruption of the voyage does not warrant the assured in totally disengaging himself from the adventure, and throwing this burthen on the underwriters. It is unnecessary to pursue the subject farther, as there is not any case nor principle which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable, at the time of abandonment. This rule therefore for a nonsuit must be made absolute. (a)

(a) See *Thompson v. Royal Exchange Assurance Company*, 16 East, 214.

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BEALE *against* THOMPSON.*Monday,*  
*Nov. 29th.*

**A**CTION in the Common Pleas, and upon special verdict found judgment for the defendant; which judgment was reversed upon error into this Court, and the damages assessed by the verdict adjudged to the plaintiff, and also — for his costs and charges, &c. Afterwards upon error brought in parliament the judgment of this Court was affirmed in the house of lords; and it was ordered that the record should be remitted to this Court, to the end that such proceedings should be had thereon as if no such writ of error in parliament had been brought; and no sum was awarded to the plaintiff for costs by the court of parliament.

This Court will not refer it to the Master to tax the plaintiff his costs in error in parliament on a judgment affirmed on error in Dom. Proc. without awarding costs, and remitted to this Court to the end that such proceedings may be had thereon as if no such writ of error had been brought.

*Holt* thereupon obtained a rule nisi on a former day to refer it to the master to tax the plaintiff his costs in error in parliament, as well as his costs in this Court. He referred to stat. 3 *H. 7. c. 10.*, which enacts, that if judgment be affirmed on writ of error, the person against whom the writ of error is sued shall recover his costs, &c. by discretion of the justice afore whom the said writ of error is sued; and he admitted that it had been considered in *Salt v. Richards* (a) that the statute relates to the court of error, and not to the court out of which the error comes, and that the former was the proper forum to tax the costs; but he contended that that was where final judgment, and not where interlocutory judgment only was given by the court of error.

(a) 7 *East*, 111.

And

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against  
THOMPSON.

And he put the same construction on 13 Car. 2. st. 2. c. 2. s. 10., and urged, that here the affirmance in the house of lords being interlocutory, and the record remitted to this Court for final judgment, this Court were at liberty to tax the costs.

But on this day when *Gaselee* was to have shewn cause,

LORD ELLENBOROUGH C. J. said, What authority have we to tax the costs in parliament? The practice of the house of lords is to give a sum in gross in their discretion, according to the nature of the case, which is to be taken as equivalent to costs; or they may think that no costs are due (a). Since the rule was obtained, which was somewhat of an anomalous nature, I have made enquiry, and find that such a practice as now attempted to be resorted to has never obtained.

BAYLEY J. The rule prays that which would be matter of error in our judgment.

*Per Curiam,*

Rule discharged.

(a) See 2 Err. 1097.

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## MEMORANDA.

AT the beginning of this term Sir VICARY GIBBS, Knt., one of the Justices of the Court of Common Pleas, was appointed Lord Chief Baron of the Court of Exchequer, on the resignation of the Right Honorable Sir ARCHIBALD MACDONALD, Knt.

And in the course of the term Sir ROBERT DALLAS, Knt., His Majesty's Solicitor-General, was appointed one of the Justices of the Court of Common Pleas in the place of Sir VICARY GIBBS, and took for his motto on being called Serjeant *Mos et Lex*.

END OF MICHAELMAS TERM.

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THE HISTORY OF THE

REIGN OF  
HIS MOST  
GRACIOUS  
MAJESTY  
GEORGE THE  
THIRD  
BY  
SAMUEL JOHNSON  
ESQ;  
IN TWO VOLUMES.  
LONDON:  
PRINTED BY  
J. JOHNSON, ST. PAULS-CHURCH-YARD, 1784.

# C A S E S

ARGUED AND DETERMINED

1814.

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IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Fifty-fourth Year of the Reign of GEORGE III.

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## MEMORANDA.

The King's Warrant respecting the Precedence of  
*Mr. Attorney and Solicitor General.*

WHEREAS our *Attorney and Solicitor General* now have place and audience in our courts next after the two ancientest of our Serjeants at Law for the time being, and before our other Serjeants at Law; We, considering the weighty and important affairs in which our *Attorney and Solicitor General* are employed on our behalf, and in which the *Attorney and Solicitor General* of us, our heirs and successors, may hereafter be employed, do hereby ordain and direct, that at all times hereafter the *Attorney and Solicitor General* of us, our heirs and successors, shall have place and audience, as well before the said two ancientest of our Serjeants at Law, as also before every person who now



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is one of our Serjeants at Law, or hereafter shall be one of the Serjeants at Law of us, our heirs and successors. And we do hereby will and require you not only to cause this our direction to be observed in our Court of Chancery, but also to signify to the Judges of all our other courts at *Westminster* that it is our express pleasure that the same course be observed in all our said courts.

Given at our Court at *Carlton-House*, this fourteenth day of *December*, in the fifty-fourth year of His Majesty's reign.

By command of His Royal Highness the Prince  
Regent, in the name and on the behalf of His  
Majesty.

SIDMOUTH.

To the Right Honourable *John*  
Lord *Eldon*, our Chancellor  
of *Great Britain*.

In the last vacation Mr. Serjt. *Shepherd* was appointed His Majesty's Solicitor-General, in the place of Sir *Robert Dallas*, Knt.

And Mr. Serjt. *Best* was appointed Solicitor-General to His Royal Highness the Prince of *Wales*, in the place of Mr. Serjt. *Shepherd*.

1814.

FENNY, on the Demise of EASTHAM, Widow,  
against CHILD. (a)

Monday,  
Jan. 14th.

**EJECTMENT.** At the trial before Lord *Ellenborough* C. J. at *Hertford*, the case was this: the lessor of the plaintiff and her husband *Eastham*, (since deceased,) by indenture (11th *February* 1803,) demised the land in question to the defendant *habendum* so much as was freehold, from the 29th *September* then next for the term of 21 years, provided *Eastham* and wife or the survivor of them should so long live, and so much as was copyhold, from the same time for the term of three years under the same proviso. *Reddendum* during the said term of 21 years the yearly rent of 31*l.* 10*s.* And by the said indenture (after several covenants) reciting that it was thereby agreed that for the said yearly rent of 31*l.* 10*s.*, and under the said covenants, the defendant might hold the said premises as well copyhold as freehold, for the term of 21 years to commence as aforesaid as if that demise had been so made; but that the copyhold were not grantable for any longer term than three years successively, *Eastham* and his wife covenanted with the defendant that they should within three months next before the expiration of the said term of three years under the like covenants, and without any increase of rent, execute to the defendant a new lease of the said copyhold for three years to commence after the expiration of the former term of three years, and so toties quoties until the term

Demise of freehold and copyhold lands at an entire rent, habendum so much as freehold for 21 years, and so much as copyhold for 3 years warranted by the custom, and covenant for renewal of the lease of the copyhold every 3 years, toties quoties during the 21 years under the like covenants, and that in the mean time, and until such new leases should be executed, the lessee should hold the said land as well copyhold as freehold, &c. Held that this was only a lease of the copyhold for 3 years, and that the lessor after the 3 years might recover the premises in ejectment against the lessee, there not having been any fresh lease granted.

(a) Cause was shewn against the rule at *Serjeants'-Inn* before this term.

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 against  
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of 21 years was expired. And it was agreed that in the mean time and until such new leases should be executed, the defendant should quietly hold and enjoy the said land as well copyhold as freehold, at the rent and upon the conditions before mentioned, for the term of 21 years, without any interruption from *Eastham* and his wife, or any other person claiming under them. No fresh lease of the copyhold had ever been granted; and a notice to quit on the 29th September 1812, had been served on the defendant. The doubt at the trial was whether the indenture passed to the defendant any greater estate in the copyhold than for three years; and thereupon a nonsuit was directed with liberty to move to enter the verdict for the plaintiff for such part as was copyhold..

*The Solicitor-General* accordingly obtained a rule in the last term for that purpose.

*Best Serjt.* and *Barneswall* shewed cause and contended, that though there was not any express demise of the copyhold to hold for 21 years, but only for three years, yet it appeared from the terms of the indenture, to be the intention of the parties, that there should be a continuing interest in the copyhold as well as the freehold during the 21 years; to effectuate which there was not only a covenant for renewal at the expiration of every three years, but it was agreed that until the new lease should be executed the defendant should hold and enjoy the copyhold for the term. That passed an interest; a covenant that a man shall hold and enjoy land passes to him an interest in the land, or at least estops the covenantor from treating him who holdeth

holdeth under the covenant as a trespasser. And though the lord by reason of this agreement might enter for a forfeiture according to *Richards v. Sely* (a), yet the lessor of the plaintiff has concluded himself by his own agreement from disputing the title of the defendant, *Doe v. Rosser* (b). It was argued indeed in *Richards v. Sely*, that the covenant should never be intended a lease, because the estate being copyhold, it would be a forfeiture of the estate; to which it was answered that that is where the words are doubtful, and such as may admit of divers constructions; but here the plain meaning of the parties was to make a lease. And if the lessor of the plaintiff can recover in this action, the consequence will be, that the defendant will be entitled in an action against him upon his covenant to recover damages to the value of the lease; therefore, to avoid circuity of action, this ejectment cannot be maintained.

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*The Solicitor-General* contra, was stopped.

LORD ELLENBOROUGH C. J. The intention of the deed seems to have been to continue the lease of the copyhold from time to time by an efficient act of the party. That has not been done; and therefore if it stands as a lease it must be by the operation of the covenant; but that does not seem to me to amount to a lease. The nature of the estate must always help to govern the agreement of parties concerning it, and a covenant cannot have the effect of giving the estate qualities contrary to those which the law has attached upon it. This is a covenant for such a lease as might

(a) 2 Mod. 80.

(b) 3 Est. 15.

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 FENNY  
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 CHILD.

be, and not a lease for such an estate as could not be. It struck me at the trial nearly in the same way as it has now been argued, but I have changed my opinion; and though it might be convenient for preventing circuity of action, I am afraid it would be against law.

BAYLEY J. If the agreement conveyed an interest in the land, the lord would be entitled to enter for a forfeiture; but it is clear he cannot; and if it made the defendant tenant at will, there has been a notice to quit. The defendant must resort to his remedy upon the covenant.

DAMPIER J. referred to Lady *Montague's* case (a) as in point; there the Court took the distinction between a demise, to hold for a year warranted by the custom, et sic de anno in annum for more years, which would make a forfeiture; and a demise for a year according to the custom, and a covenant for holding it for longer time; and there are other cases to the same effect (b). The defendant's remedy lies on the covenant; for the Court cannot by construction, in order to avoid circuity of action, make words which import only a covenant, a lease inconsistent with the nature of the estate.

*Per Curiam,*

Rule absolute.

(a) *Cra. Jss.* 301.

(b) See 2 *Keb.* 267. *Lembell v. Thomas.*

1814.

**BELL against OAKLEY and eight Others. (a)***Monday,  
Jan. 24th.*

**TRESPASS** for breaking and entering the plaintiff's dwelling-house, breaking the doors and windows, and taking and carrying away his goods. *Plea, Not guilty.*

At the trial before Lord *Ellenborough* C. J. at the last assizes for the county of *Kent*, it appeared that the defendants, two of whom were the churchwardens, four the overseers, and two constables of the parish of *Deal*, together with the other defendant acting in their aid, went to the house of the plaintiff who was an inhabitant of *Deal*, carrying with them a warrant granted by two magistrates, and directed to the said churchwardens and overseers, to distrain the plaintiff's goods for non-payment of a poor's rate. Having knocked at the door, and being informed at the next house that the plaintiff was from home, one of the defendants jumped into the front area and tried to get in at the cellar but failed; in the attempt, however, some windows were broken. They then proceeded to the back part of the house, took the fastening out of a window and got into the wash-house. After continuing there some time, and having found nothing within, the inner door being locked, they returned and took away some planks and other articles which were lying in the garden. A verdict was found for the plaintiff, damages seven guineas, with leave for the defendants to move to enter a nonsuit on the ground of there not being any

Where defendants, in order to levy a poor's rate under a warrant of distress granted by two magistrates, broke and entered the house and broke the windows, &c.: Held that they might be sued in trespass without a previous demand of the perusal and copy of the warrant, according to 24 G. 2. c. 44 s. 6.

(a) Cause was shewn against the rule at *Serjeants'-Inn* before this term.

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and Others.

proof of a demand of the copy of the warrant as required by stat. 24 G. 2. c. 44. s. 6.

A rule nisi to that effect was accordingly obtained in the last term. And now after the report had been read, Lord *Ellenborough* C. J. referred to *Money v. Leach* (a), and inquired how the rule could be supported consistently with that decision.

*The Common Serjeant* and *Bolland* in support of the rule, took this distinction, that in that case the parties acted wholly without the authority of the warrant, for they executed the warrant upon a person who did not correspond with the description in it; whereas here the defendants acted in partial execution of the warrant, though it must be admitted they exceeded its authority; but still they were not wholly unauthorized. And they cited *Price v. Messenger* (b) to shew that an officer may be entitled to the protection of the statute, where he has exceeded the authority delegated to him by the magistrate.

LORD ELLENBOROUGH C. J. The case of *Money v. Leach* decides that the defendant in order to avail himself of the objection upon the statute must shew that he acted in obedience to the warrant; in that case the officers apprehended a different person from that described in the warrant, and therefore not in obedience to the warrant; and Mr. *Yorke* the then Attorney-General, who was to have argued on behalf of the officers, gave up the point upon the second argument as being too great a difficulty for him to encounter. Here the

(a) 3 Burr. 1742. S. C. 1 Bl. R. 555. (b) 2 Bos. & Pull. 158.

defendants

defendants so far from shewing that they acted in obedience to the warrant commence by an unauthorized course of proceeding; it was a trespass in them *ab initio*; and I do not see how after the case of *Money v. Leach*, they can stir this objection. That was a case of much public interest and was decided upon great deliberation, and the matter was upon the record. If this had been a distinct subsequent trespass of the defendants, it might have presented a different question.

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BAYLEY J. In *Price v. Messenger* the defendant so far as he acted in obedience to the warrant was under the protection of the statute, but he was holden liable for the seizure, which was not made in obedience to the warrant.

DAMPIER J. The case of *Money v. Leach* decided that where the justice cannot be liable, the officer is not within the protection of the statute. In this case suppose notice had been delivered to the justice, for what could he have tendered amends? In *Price v. Messenger* the justice might have been proceeded against upon the warrant.

*Per Curiam,*

Rule discharged.

*Marryat* was to have shewn cause against the rule,



1814.

Monday,  
Jan. 24th.The KING *against* The Inhabitants of the  
County of NORTHAMPTON. (a)

Upon not guilty to an indictment against the inhabitants of a county for not repairing a public bridge, it is competent to the defendants to give evidence of the bridge having been repaired by private individuals.

A bridge may be a public bridge, which is used by the public at all such times as are dangerous to pass through the river.

THE second count of this indictment, on which the verdict was entered for the crown, was for not repairing a public bridge over the river *Welland*, in a highway leading from *Northampton* to *Leicester*, used by the subjects of the king with their horses, carts, and carriages *at all such times as and when it hath been or is dangerous to pass through the river by the side of the bridge*. Plea, Not guilty. At the trial before *Thomson B.*, at the last assizes, it appeared that this bridge was used by the public at all times on foot and with horses, but only occasionally with carriages, except in times of flood, or frosts when it was unsafe to pass through the river, at which times carriages always passed over the bridge. In ordinary times the carriage-road went through the ford, and the bridge was sometimes barred against carriages by means of a post and chain which was locked. There was no doubt, upon the evidence, of the bridge being out of repair, but the counsel for the defendants proposed to give evidence to shew that the feoffees of certain estates had repaired the bridge, and that one *Rous*, as their agent, had the control of the key. To this it was objected that repairs done by individuals could not be evidence to shew the bridge not a public bridge, which was the only issue upon these pleadings. The learned Judge was of that opinion, and rejected the evidence.

(a) Cause was shewn against the rule at *Serjeants'-Inn* before this term.

Copley

*Copley* Serjt. moved, in the last term, for a rule nisi for a new trial, upon the rejection of this evidence; and he also took exception to the count that it did not shew the bridge to be a public bridge, but only a bridge to be used on particular occasions, which could not be if it were a public highway; for, according to the language of *Heath J.* in *Roberts v. Karr* (a), there could not be a partial dedication to the public. But Lord *Ellenborough C. J.* said, though it must be an absolute dedication to the public, still it might be definite as to time; and the Court granted the rule on the first point only.

*Clarke, Vaughan Serjt., Dayrell, and Abbott*, shewed cause, and maintained that however material the evidence might have been upon plea by the defendants charging the feoffees with the reparation of the bridge, it was not evidence upon the point whether it were a public bridge, which was the only remaining point upon the pleadings after the bridge was proved to be out of repair. The use of the bridge, and not the mode in which it is repaired, constitutes it a public bridge; and admitting that it could have been proved to have been repaired by these feoffees from all time, still it might be a public bridge; and so the defendants, notwithstanding the evidence, would, on this issue, have been liable. It was, therefore, perfectly irrelevant to the matter in issue.

LORD ELLENBOROUGH C. J. I doubt whether in the extreme rigor of correctness this evidence ought not to

(a) 1 Camp. N. P. C. 262. n.

have

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NORTHAMP-  
TON.

have been received, though certainly if it had stood by itself it would have had but little effect. The only question was, whether this were a public bridge. And might it not be material upon that question to inquire by whom and in what manner it had been repaired, with a view of ascertaining whether those repairs were adapted to the service of the public, or merely to the purposes of ornament or private convenience? In order to ascertain whether it be a public bridge, the mode of its construction and the manner of its continuance may be circumstances which, as they are connected with others, may have much or little weight. But we are not inquiring into the effect of the evidence; it is enough if the fact by whom repaired may be in any degree a criterion to determine whether the bridge be or be not of a public nature. Repairs done by an individual are *primâ facie* rather to be ascribed to motives of private interest in his own property, than as done for the public benefit; and if an inference might have been drawn from the fact, the jury ought to have had an opportunity of judging of that inference. It was not of much weight, perhaps, but upon the *summum jus* I think the evidence was admissible. It is not necessary that the bridge should have been open at all times; perhaps it has grown out of this circumstance, that there was a highway through the ford, and the people, when that was bad, were used to go by outlets on the land adjoining, to the great detriment of the individual owner. The bridge, therefore, like many others, may have originated in the convenience and for the protection of the individual, but still it may be of public right. I think that the evidence was barely admissible,

admissible, and that the learned Judge would have exercised a more correct discretion by receiving it.

**LE BLANC J.** It was for the prosecutor to shew it a public bridge; and the defendants had a right to give every species of evidence to shew the contrary. One medium of proof was to shew that it had been repaired by individuals; though that alone would be of very little weight.

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NORTHAMPTON.

**DAMPIER J.** From the circumstance of private persons repairing the bridge, it was open to the defendants to contend that it was not a public bridge, with what effect I do not say, though possibly it would not have been great. It might, however, be a link in the evidence to shew the passage over the bridge was not of public right but of sufferance.

*Per Curiam,*

Rule absolute.

**JARRETT against LEONARD. (a)**

*Monday,  
Jan. 24th.*

**I**N an action brought by order of the Lord Chancellor by the plaintiff, against whom a commission of bankruptcy had issued, against the defendant,

In an action by a bankrupt against the petitioning creditor to try the validity of the

commission, proof that the bankrupt and petitioning creditor attended the second meeting of the commissioners and discussed before them the debt due to the petitioning creditor, and produced their accounts, and that the bankrupt objected to part of the petitioning creditor's account, and the commissioners ticked off such items in it as they allowed, and struck a balance of 169*l*, was held to be evidence to be left to the jury of an implied admission by the bankrupt, from his conduct and demeanor before the commissioners, that such a balance was due, but not of an adjudication by them by their own authority, or of an award made by them with the consent of parties; and therefore where it had been so left to the jury, the Court granted a new trial.

(a) Cause was shewn against the rule at *Serjeants'-Inn* before this term.

who

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who was petitioning creditor and assignee under that commission, which was tried before *Dampier J.* at the last assizes at *Worcester*, the defendant having given notice under the statute of his intention to dispute the proceedings under the commission, the only question was, as to the existence of the petitioning creditor's debt. It appeared that some time before the issuing of the commission there had been a meeting between the plaintiff and the defendant and their attorney, when a proposal was agitated for giving the defendant a warrant of attorney for 250*l.*, which, however, was not carried into effect. At the second meeting of the commissioners under the commission, the plaintiff and defendant attended, the latter with his attorney, and the debt due to the defendant was discussed between them before the commissioners. The defendant produced his account, and the items of it were ticked off by the commissioners as they allowed them. The plaintiff also said he had accounts, and produced them to the commissioners, who examined the vouchers, and went through the accounts. Part of the plaintiff's account was objected to by the defendant, and at last a balance was allowed by the commissioners of 169*l.* 18*s.* Nothing more was said by the plaintiff. The defendant made a farther demand of about 70*l.* It was objected that this was not evidence against the plaintiff of the existence of a good petitioning creditor's debt; but the learned Judge was of opinion that it was at least *prima facie* evidence, and likened it to an adjudication by the commissioners, or a settlement of accounts before an arbitrator, and said he thought the debt was established by the investigation of the commissioners. A verdict was thereupon found for the defendant.

A rule nisi for a new trial was obtained in the last term upon the same objection, in support of which it was urged, that the commissioners had no authority of themselves to bind the plaintiff, and that the plaintiff by attending and disputing the petitioning creditor's debt before them, did not constitute them a judicature by which he voluntarily submitted to be bound, but that their decision was in invitum.

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*Jervis, Abbott and Puller* shewed cause, and did not insist that what was done by the commissioners was res adjudicata, as if done under their original authority, but contended that it amounted to an adjustment of the debt with the consent of the parties; and they adverted to the evidence of the prior treaty respecting the warrant of attorney as confirming the existence of such debt. It is true that the plaintiff was bound to appear to his commission, and so far his act was not voluntary; but he was not bound to come with his accounts before the commissioners, and make them the arbitrators of the disputed balance. The commissioners were to a certain extent as far as regarded the ordinary proceedings under the commission, not of his own choice; but that will not hinder their being arbitrators, if the party volunteers to make them such. He might have refused to litigate this debt before them; but now that he has chosen to do it, it shall not be permitted him to say that that has been done in invitum which was done at his own instance. It was a voluntary submission to their decision, and if not conclusive was certainly *prima facie* evidence against the plaintiff. In *Pirie v. Menzies* (a), the proof before the commissioners was entirely

(a) 3 Camp. N. P. C. 279.

ex parte,

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ex parte, and without any assent of the bankrupt or assignees, and on that account was considered as not sufficient evidence of the debt.

*Campbell* (with him *Dawncsey*) contra, as to the proposal respecting the warrant of attorney said that it was made with a view only of protecting the bankrupt's goods for the benefit of all his creditors; and he insisted that what took place before the commissioners was not evidence of the petitioning creditor's debt. The meeting was not held for the purpose of ascertaining the petitioning creditor's debt, which had been done before upon the opening of the commission; neither was the proof offered or received with that view, but only with a view to a dividend; and if the bankrupt thought that the debt was not due it was his duty to resist the proof before the commissioners; therefore such resistance shall never be construed into an agreement on his part to be bound by their determination. Neither does it amount to an admission that such a balance was due; it does not appear that he expressly admitted it, nor can it be implied from his silence after the commissioners had allowed the balance; it would have been unavailing to have farther disputed it. If the proof be *primâ facie* evidence, it will be conclusive in most instances, for it will be difficult to rebut it by proving the negative, that there was no petitioning creditor's debt.

Lord ELLENBOROUGH C. J. If it was left to the jury upon the demeanour and conduct of the bankrupt, at the time when the accounts were produced and the set-off gone into, whether his demeanour and conduct before

before the commissioners as indifferent persons, without looking to their situation of commissioners, was such as to amount to an admission of the debt, I think it was rightly left to the jury, and they might draw the inference which they did. My doubt is whether it was left as the admission of the party, or whether what was done before the commissioners, did not derive an authority from its being done before them as commissioners or as arbitrators. As commissioners they had not any authority to conclude the bankrupt by such an investigation; and it does not appear that they were constituted arbitrators with the assent of the parties. If the question went to the jury upon the admission of the party as it was to be collected from his conduct before the commissioners, I think it was properly left to them, but if it was carried farther I have much doubt whether its effect was not overstated.

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 JARRETT  
*against*  
 LEONARD.

LE BLANC J. I collect from the learned Judge that some weight was given to the circumstance of its being determined before the commissioners, and that it was not left to the jury merely as an admission of the party.

DAMPIER J. I think that I rather left it to the jury as being a debt which was established by the investigation of the commissioners than one that was admitted by the party.

*Per Curiam,*

Rule absolute.



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Monday,  
Jan. 24th.

GOODRIGHT, on the Demise of RICHARDS,  
against WILLIAMS. (a)

*Herefordshire* is the next adjoining *English* county to *South Wales* for the trial of issues arising there; therefore where on ejectment for lands in *Cardigan* the venire was awarded out of *Salop*, and objection was thereupon made at the trial, and a verdict found for the plaintiff, the Court arrested the judgment: and though it appeared that *Salop* was in fact nearer to the lands in question, and more easy of access, that was held not to vary the practice.

**EJECTMENT** for lands in *Cardiganshire*, and the venire was awarded out of *Salop* upon a suggestion of its being the next *English* county, and the cause came on there at the last assizes before *Dampier J.* when objection was taken that *Salop* was not the next *English* county to *South Wales*; but the learned Judge being of opinion that the objection was on the record, permitted the trial to proceed, and a verdict was found for the plaintiff.

*W. Owen* moved in the last term in arrest of judgment, on the ground of a mistrial, for that the venire ought to have come out of *Herefordshire*; or to set aside the verdict for irregularity; and he produced an affidavit which stated it to be the invariable practice, to try all issues arising in *South Wales* in *Herefordshire*, as the next *English* county; and he said that if *Salop* were the next *English* county, then all the judgments in causes arising in *South Wales* which have passed upon verdicts given in *Herefordshire* would be erroneous; and he cited *Morgan v. Morgan* (b).

*Abbott* and *W. E. Taunton* shewed cause, and as to setting aside the verdict, they relied on an affidavit

(a) Cause was shewn against the rule at *Serjeants'-Inn* before this term

(b) *Hark. 66.*

which

which stated that the premises in dispute, and the residence of the witnesses, were nearer to the county of *Salop* than of *Hereford*, and that the town of *Shrewsbury* was nearer than the city of *Hereford*, and the trial could be had at less expence there, and the witnesses could attend with greater convenience than at *Hereford*, there being a stage coach from *Aberystwith*, near to which the premises were situate, to *Shrewsbury*, and none to *Hereford*. And they referred to *Ambrose v. Rees (a)*, where the trial being at *Monmouth*, which was in fact the next *English* county, the Court refused to set aside the verdict on that ground; and though the Court gave as a reason that the defendant did not object at the time, that cannot mean at the time of trial; for the objection would be of none effect, the Judge being bound to try it. The time for objecting therefore must be upon delivery of the issue, when the suggestion is entered, and the party may apply to have the suggestion altered, or he may counterplead it; in the same way as upon a suggestion of the death of either party, the other party may traverse it. And for this purpose it appears from the case of *Brocas v. Civil London (b)*, that he shall have reasonable time before the entry of a nient dedire. And it is observable that stat. 13 G. 3. c. 51., for discouraging frivolous suits upon causes of action arising in *Wales*, speaks in the preamble of the practice being to try the same "in the nearest adjoining *English* county to that part of *Wales* in which the cause of action has arisen," so that if proximity of place is to be attended to, the affidavit brings the case within the very letter of that preamble. As to arresting the judgment, they said that *Morgan v. Mor-*

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(a) 11 East, 370.

(b) 1 Str. 235.

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*gan* was the only case in which that had been done; and that was on a different ground from this, viz. that *Monmouthshire* was but made an *English* county by stat. 27 *H.* 8., within time of memory, and trials in *prox. com.* of issues arising in *Wales* have been time out of mind at the common law. That, therefore, is only an authority to shew that trials upon causes of action arising in *South Wales* cannot be had in *Monmouthshire*, but not that they must be in *Herefordshire*. And it appears by a case in *Fitzh.* 18 *Ed.* 2. (a), that upon an assize of novel disseisin for lands in *Gowre*, in the marches of *Wales*, the assize passed against the tenant upon a writ directed to the sheriff of *Gloucester*, as being the next *English* sheriff; and upon error, shewing that for cause, the judgment was affirmed. So that it appears not to have been the invariable practice of that time to try these issues in *Herefordshire*. And at all events, admitting the practice to be so now, this amounts to no more than a defect of venue, which is aided by the statute of jeofails (b).

*W. Owen*, (with him *Dauncey*,) contra, denied that this case was to be decided upon the precise admeasurement of distance, or the facilities of access between place and place, for that would afford an uncertain rule depending upon the change of roads and conveyances, and various other circumstances; and therefore he contended that this was matter of law arising out of the invariable practice, of which the Court would take judicial notice; or if not, would receive information upon affidavit. In *Ambrose v. Rees*, though the Court

(a) *Assize*, pl. 382. 5. C. *Faugh*, 403. (b) 16 & 17 *Car.* 2. c. 8.

refused to relieve the defendant upon motion, that was because he did not object at the time, whereas here he did object at the trial, which was as soon as he could, for the issue was not delivered till the 28th of *July*, so that he had not an opportunity of applying to a Judge; and at all events, according to *Ambrose v. Rees*, the objection is on the record. And in stats. 27 *H. 8. c. 5.* and *c. 26. s. 39.* it will be found that *Cardigan* is recognised as a county in *South Wales*; and *Morgan v. Morgan* is an authority to shew that *Herefordshire* is the next *English* county to *South Wales*, for the trials of all issues arising there. And the 27 *H. 8. c. 26.* recites, "that *Wales* ever hath been incorporated, annexed, united, and subjected to, and under the imperial crown of this realm, as a very member and joint of the same;" so that there is not any inconsistency in what was said by the Court in that case, that trials in *prox. com.* have been time out of mind and at the common law. As to the case from *Fitzh.* that may well stand with *Herefordshire* being the next county to *South Wales*, because *Gowre* lands were a part of the marches of *England* and *Wales*, and were a kind of neutral territory not belonging to either, so that a distinct rule might well appertain to them.

LORD ELLENBOROUGH C. J. I think this cannot be made a question upon the irregularity of the verdict, because the parties have appeared and tried the issue. But the question is properly in arrest of judgment. And that depends upon whether there be such a practice existing as far back as we are able to trace, that the trials of all issues arising in *South Wales* shall be in *Herefordshire*, and in *North Wales* in *Salop*. Now as to that it appears that there has been one uniform prac-

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tice; which is said in the books to have been time out of mind, and to have originated in the common law. If indeed *Wales* is to be taken as coming under the dominion of *England* only from the time of its conquest by *Edward* the First, and consequently within time of memory, such a doctrine would not be correct; but if according to the notions derived from the *Saxon* usurpation the principality was considered from all times as feudatory to *England*, the doctrine would be consistent. Whether therefore the practice originated in the common law, or from some act of parliament which is not now extant, according to the opinion of Lord C. J. *Vaughan* (a), it is so uniform that it may well be referred to one or the other. The case cited from 18 *Ed.* 2. as to *Gowre* land, has been supposed to break in upon this uniformity; but I do not think that will be so, if it be supposed that the act of parliament which provided for the trials of issues arising in *South Wales*, provided also for the trials of those which arose within the marches; that in the one case they should be either in *Herefordshire* or *Gloucestershire*, in the other in *Herefordshire* only. And in conformity with the constant practice, as it regards the trial of issues arising in *Wales*, it is but reasonable to presume, if such a presumption be necessary, that it was fixed and regulated by some legislative provision. To admit any other rule of practice would be to make what is certain, vague and uncertain. If the county is to vary according to the precise proximity of place as it is ascertained by admeasurement, the next thing we shall have to determine will be how that admeasurement is to be made.

(a) *P. 23b. 404.*

In ejectment, for instance, is it to commence from the centre or the extremity of the premises in question, or from the parish church in which they lie, and is it to end at the church or at the town hall of the assize town?

The terminus ad quem would be as difficult to settle as the terminus a quo; whereas there is not any difficulty in pronouncing that *Hereford* is the next *English* county to *South Wales*, and *Salop* to *North Wales*. The usual suggestion on the record is to that effect, and it must be taken that it is made in conformity with the law, and that the party makes a true suggestion, and therefore if it be found false it will cause the whole proceeding to be erroneous. I therefore think the judgment ought to be arrested, on the ground that there has been a mis-trial in this case, obtained by a suggestion made contrary to the law of the land.

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BAYLEY J. The statute of jeofails extends only to verdicts where the cause has been tried by a jury of the proper county; and the issue not having been delivered until after term, the party had not any opportunity of applying to the Court.

DAMPIER J. Lord *Mansfield* was of opinion that *Wales*, from the time it came into the hands of *Edward* the First, was deemed to be within the realm, upon the doctrine of having been holden before of his crown, and he said the notion of some old statute that had been lost, depended only upon a loose note of Lord C. J. *Vaughan* (a).

*Per Curiam,*

Judgment arrested.

(a) See 2 Burr. 853. *Rex v. Cow's*.

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*Monday,*  
*Jan. 24th.*

DOE, on the Demise of VAUGHAN, against  
MEYLER. (a)

Lease of lands of which lessor was seised in fee, and of other lands of which he was seised for life with a power of leasing, at one entire rent, and the lease not well executed according to the power: Held that the lease was good after the death of lessor for the lands in fee, though not for the other lands, for the rent may be apportioned.

**EJECTMENT**, tried before *Dampier J.* at the last assizes for the county of *Hereford*, which was brought by the lessor of the plaintiff, as remainderman and heir at law to his father, to recover certain lands in the county of *Pembroke*, comprised in a lease made by his father to the defendant. The case was this; the lease in question comprised as well lands of which the father was seised in fee, as three fields of which he was only tenant for life, under a power to lease at the antient rent or more, and with a clause of re-entry for nonpayment of the rent for 21 days. The lease was granted at an entire rent, with a clause of re-entry in case of nonpayment of the rent for 15 days, and no sufficient distress; so that the lease was not executed according to the power. A regular notice to quit had been given. The question was whether the lease was wholly void, or only void pro tanto as to the three fields. The learned Judge inclined to think that the rent being entire, could not be apportioned, and therefore if the lease should be void for the three fields only, the lessee would remain charged with the whole rent, which would be unreasonable; wherefore he held that the lease was wholly void, and directed the jury to find for the plaintiff. But he reserved leave to the defendant, to move to restrain the verdict to the three fields.

(a) Cause was shewn against the rule at *Serjeants'-Inn* before this term.

*W. E. Taunton* in the last term obtained a rule nisi to that effect, and cited *Co. Lit.* 148. b., and agreed that if this<sup>1</sup> had been a grant of a rent charge, the three fields would have been discharged, and the lands in fee would have remained charged with the whole rent; but he said it was otherwise upon a lease reserving a rent, for there if the lease be avoided, the rent shall be apportioned.

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*Abbott* and *W. Owen* shewed cause, and referred to *Rees v. Phillip* (a), where upon a lease by tenant in tail of the lands entailed, and also of leasehold lands, at an entire rent, the lease was held void for the whole as against the reversioner, for that there could not be an apportionment.

But Lord ELLENBOROUGH C. J. observed that it did not appear, that the attention of the Court had been directed in that case to *Co. Lit.* 148. b.; and *Bayley J.* said that *Co. Lit.* was a strong authority upon the point. And in *Stevenson v. Lambard* (b) upon covenant against the assignee of the lessee for non-payment of one entire rent, the defendant pleaded in bar of the action, eviction of a moiety of the premises by title paramount, and upon demurrer it was adjudged ill, because the rent might be apportioned; and the defendant had leave to amend and plead it to one moiety of the rent only. And *Dampier J.* said that he was misled at the trial by a recollection of the Lord *Mountjoy's* case (c), without adverting to the distinction that the grant and render of one entire rent in that

(a) *Wighw. Exch. Rep.* 69. (b) 2 *East*, 575. (c) 5 *Rep.* 3-



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case tended to destroy the evidence of the antient rent; but that was not so here, because not any rent was necessary to be reserved for the lands in fee simple; and in *Co. Lit.* 148. *b.* it is laid down that if a man be seised of two acres, one in fee, and another in tail, and make a lease for life or for years of both acres, and dieth, and the issue in tail avoideth the lease, the rent shall be apportioned.

*Per Curiam,*

Rule absolute.

Monday,  
Jan. 24th,

EVERTH and Another against SMITH. (a)

Policy on freight, valued, at and from R. and any ports in the *Baltic* to any ports in the United Kingdom, and the ship was chartered to sail with a cargo from L. to some port in the *Baltic* not beyond R., and from thence to R., there to take in a homeward cargo, &c., and sailed from L. and arrived at R., where she was detained for five weeks and prevented from loading by order of the government, and the freighter never loaded her, and a few days after the detention ceased the frost set in, which detained her there till the spring, when she procured a freight from other persons, and returned with it to L., but the expences of her detention exceeded such freight: Held that the policy had attached at the time of the detention, but that freight having been afterwards earned, the underwriter was not liable.

**A**SSUMPSIT to recover a total loss on freight, on a policy of assurance on ship valued at 1000*l.*, and on freight valued at 1200*l.*, and on cabin cargo valued at 400*l.*, at and from *Riga* and any other ports in the *Baltic* to any ports in the United Kingdom. Loss by restraint and detention of the ship by the government at *Riga*. There were also the usual money counts. Plea, general issue.

At the trial before Lord *Ellenborough* C. J. at the last *Surry* assizes, it appeared that the ship sailed from *London* on the 12th of *July* 1812, under a charter-party, by which it was covenanted that the ship being furnished with an outward cargo, should sail with the

prevented from loading by order of the government, and the freighter never loaded her, and a few days after the detention ceased the frost set in, which detained her there till the spring, when she procured a freight from other persons, and returned with it to L., but the expences of her detention exceeded such freight: Held that the policy had attached at the time of the detention, but that freight having been afterwards earned, the underwriter was not liable.

(a) Cause was shewn against the rule at *Serjeants'-Inn* before this term.

same

same from the port of *London* to some port in the *Baltic* not beyond *Riga*, and having discharged her cargo should proceed in ballast to *Riga*, and being arrived there give notice to the agents of the charterers, and take on board from them at that place a full cargo of hemp, &c., and return therewith to the port of *London*, and that the ship should if required lay at *Riga*, for the purpose of taking on board her homeward cargo, and in the port of *London* for discharging the same, 40 running days and ten days on demurrage. The ship delivered her outward cargo at *Colberg*, and proceeded to *Riga* under a *Rostock* flag, where she arrived on the 23d of *September*, and the master immediately gave notice to the charterers' agent, and delivered his papers at the custom house, and applied for their return, and for leave to reload, but his papers were refused and he was informed that his ship was under sequestration, and that he could not be permitted to reload. This was on the fourth day after his arrival, and during the continuance of this restraint the master applied to the charterers' agent, who was unable to load on account of the order from the *Russian* government prohibiting the loading of goods on board ships sailing under *Rostock* colours. The restraint continued about five weeks, and on the 30th of *October* the frost set in, in consequence of which the ship was detained there the winter, and never got a loading from the charterers' agent, but the next spring the master procured a freight from other persons, with which he returned to this country, the expences which had been then incurred amounting to as much or more than such freight. Under these circumstances the plaintiffs contended that

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that this was a loss within the policy, being a loss of the freight which would have accrued under the charter-party, by means of one of the perils insured; and they were willing to abandon to the underwriter the freight actually earned, on being allowed the expences incurred by the ship's detention at *Riga* during the winter. The defendant, on the other hand, contended that it was not a loss within the policy, because the insurance was not on any particular designated freight, but only on freight for a designated voyage, and that freight had been earned by the performance of the voyage. A verdict however was found for the plaintiffs.

*Marryat* obtained a rule nisi in the last term for a new trial; in support of which he urged that the plaintiffs' right to freight under the charter-party had never commenced, because it did not appear that any part of the cargo was ever put on board, or ready to be shipped; neither was the loss of that freight induced by a loss of the ship; and so the case was distinguishable from *Montgomery v. Egginton* (a), *Thompson v. Taylor* (b), *Horncastle v. Suart* (c). And he cited *McCarthy v. Abel* (d) to shew that an embargo is not a cause of loss if freight be afterwards actually earned by the assured.

*Best Serjt.* and *Taddy* shewed cause, and relied on *Thompson v. Taylor*, and *Horncastle v. Suart*, and *Mackenzie v. Shedden* (e) as decisive that the plaintiffs acquired an inchoate right to freight under the charter-

(a) 3 T. R. 362.

(b) 6 T. R. 478.

(c) 7 East, 400.

(d) 5 East, 388.

(e) 2 Camp. N. P. C. 431.

party by the commencement of the voyage, without taking any goods on board; and they referred to *Davidson v. Willasey* (a) as marking the distinction in this respect between a chartered and a general ship. And as to the loss, they contended that although in those cases there was a total loss of the ship which occasioned the loss of the freight, still freight may be equally lost by any other of the perils insured. In *Forbes v. Aspinall* (b) the Court said that freight is the profit earned by the ship-owner in the carriage of goods on board his ship, and an insurance on freight is to secure that profit, in case he is prevented by any of the perils insured from earning such profit. And have not the assured in this case been prevented by the detention from earning the profits which would otherwise have accrued to them under the charter-party? If they have, the language of *Le Blanc J.* in *Davidson v. Willasey*, is decisive; he said that in the case of a freight policy, where the assured has entered into a contract for freight, under which he would be in a condition to earn his freight, if the voyage were not stopped by a peril insured, there if the voyage has commenced in which the freight is to be earned, and be stopped by any of those perils, the assured will be entitled to recover to the full amount. It may be argued, perhaps, that the assured might have loaded after the restraint ceased, and for that purpose might have kept the ship 10 additional days on demurrage; but they were not bound to do so; that was an option given them for their benefit, and not their prejudice. Besides, the Court has never said that every nice question between the freighter and owner shall be

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(a) 1 M. &amp; B. 313.

(b) 13 East, 325.

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raised by the underwriter. As to *McCarthy v. Abel* the distinction is clear, because there the assured, notwithstanding the embargo, earned the very same freight that he contracted for. But here the freight actually earned is not the specific freight; neither can it be said to be an earning of profit when it appears to have been not only of no benefit to the plaintiffs, but a losing concern.

*The Solicitor-General* and *Marryat*, contra, after some argument, admitted upon the cases cited that there had been an inception of the risk under the charter-party, but denied that they were authorities to shew that such a loss had happened in this case as would entitle the assured to recover. On the contrary, in all of them there had been a loss of the ship so as to cause a total failure of the voyage, and there is not any instance in which the voyage having been performed and freight earned, the assured have been permitted to recover by reason of a detention occasioning the failure of a contract, under which other, and perhaps more beneficial freight would have accrued. To hold that the assured might recover in such a case would be to make the underwriter not an insurer on freight for the voyage, but an insurer for the performance of the particular contract; and supposing that could be done, still it does not appear that the contract could not have been performed, or that any thing more than a delay in the performance was occasioned by the detention. The freighter was not discharged from his contract, and perhaps if he had had his cargo ready to be put on board when the detention ceased the ship might have been able to sail in the interval before the frost set in; but if not, it amounts only to a delay of the adventure.

ture. And *McCarthy v. Abel* decided that a loss is not demandable against the underwriter on freight by reason of a delay occasioned by one of the perils insured, if the freight be ultimately earned; and it matters not to the underwriter, who merely insures against the loss of that particular subject, whether the freight earned be the same as contracted for or a different freight. So in *Anderson v. Wallis* (a) it was adjudged that a loss of the voyage for the season did not warrant the assured in abandoning and throwing the burthen on the underwriter.

Lord ELLENBOROUGH C. J. There is no doubt that the policy attached; but before we decide the other point I should wish to refer more particularly to *McCarthy v. Abel*, and *Anderson v. Wallis*, which, according to my recollection of them, will go a great way to the decision of this.

On a subsequent day at *Serjeants' Inn*,

Lord ELLENBOROUGH C. J. delivered the opinion of the Court in substance as follows: This was a policy of insurance at and from Riga and any ports in the Baltic to any ports in the United Kingdom, on ship valued at 1000*l.*, on freight valued at 1200*l.*, and on cabin cargo valued at 400*l.*, and the loss was declared to be by detention of the government at *Riga*. The only question made was respecting the recovery of the freight, whether this was such a loss as to entitle the assured to recover. The only way in which it was treated as lost was, that the ship, on account of her carrying a *Rastock* flag was not

(a) *Ante*, 240.

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considered by the government at *Riga* as a ship which ought to be permitted to take on board a cargo, and notice was given to the captain that he was not to be allowed to load. His papers were not returned to him, and being thus unable to take in her cargo the ship was detained at *Riga* for five weeks. The agent of the assured could not load on account of her detention, and being under a *Rostock* flag. The frost set in on the 30th of *October*, so that there was a period of a few days after the detention ceased before the frost began. The ship remained there the winter, and never received a loading from the charterers, but in the spring procured another loading with which she returned home and earned her freight, but the expences incurred by her stay exceeded such freight. It was contended under these circumstances that this amounted to a total loss of the freight. Before we pronounced our opinion we wished to look into the cases, particularly those of *Anderson v. Wallis*, and *McCarthy v. Abel*, and on reference to those cases we find ourselves confirmed in the opinion we entertained upon the argument, that this is not a case of loss recoverable under the policy. This was an insurance on freight generally, not on any specific freight; the charter-party is only material to shew that upon the ship's arrival at *Riga* there was an inchoation of the risk. The underwriter did not insure that any particular freight should be brought home, but if any freight is brought home, a loss has not happened for which he undertook to indemnify the assured. In this case the only inconvenience that has arisen is to be attributed to the protraction of the adventure, but that was decided in *Anderson v. Wallis*, and *McCarthy v. Abel*, not to

constitute a loss. In *McCarthy v. Abel* it was held not to be a loss of freight, the freight having been specifically earned: the Court said, "the single point was, whether the freight had been lost or not. If the fact were merely looked at, freight in the events which had happened had not been lost, but had been fully earned and received by or on behalf of the assured: and if so, no loss could be properly demandable against the underwriters on freight, who merely insure against the loss of that particular subject." And how far the protraction of the adventure would under the circumstances warrant an abandonment was considered in *Anderson v. Wallis*. That was a case in which the ship from stress of weather was driven into *Kinsale* in a damaged state, and obliged to undergo repairs, by reason of which she could not reach *Quebec*, her port of destination, that season, so that there was a loss of the benefit of the market contemplated by the assured; and the question was, whether this amounted to a total loss of the cargo within the policy, which was warranted free of particular average. The Court there said, (supposing abandonment could be allowed at all,) "that the only description of loss capable of sustaining an abandonment so as to convert an average into a total loss, was a temporary suspension of the voyage. But what case has decided that such a temporary retardation is a cause of abandonment so as to amount to a total loss? Disappointment of arrival is a new head of abandonment in insurance law." So here it may be said, the not obtaining the freight looked for is a new head of abandonment, and so it is of loss. It was said in that case, "if the retardation of the voyage be a cause of abandonment, the happening of any peril by

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which a delay is caused in the arrival of the ship at the earliest market, would also be a cause of abandonment." It is certainly a loss of the particular trade which the assured had personally in contemplation, but it is not within the intention of the policy. On the authority of the above cases, as well as upon general principles of law, it appears to us that the mere retardation of the adventure, and the consequent inconvenience and expence arising from it are not a substantive cause of loss where the particular thing insured has not received damage; and whether the freight earned be the particular freight contracted for by the assured or a posterior freight makes no difference; if freight has been fully earned there can be no loss properly demandable of the underwriters. Under these circumstances therefore we think a new trial should be granted.

*Per Curiam,*

Rule absolute.

Tuesday,  
Jan. 25th.

SCHNEIDER and Another *against* NORRIS.

A bill of parcels, in which the name of the vendor is printed, and that of the vendee written by the vendor, is a sufficient memorandum of the contract within the statute of frauds to charge the vendor.

CASE for the non-delivery of cotton yarn, pursuant to agreement. Plea, general issue.

At the trial before Lord *Ellenborough* C. J. at the last *London* sittings, it appeared that the plaintiffs on the 24th of *October* 1812, purchased of the defendant, who was employed to sell on commission, a quantity of cotton yarn, of which a bill of parcels was sent by the defendant to the plaintiffs; not however at the time of the contract, and at what precise time did not appear. The bill of parcels was headed thus: — "*London*, 24th *October* 1812, Messrs. *John Schneider* and Co. bought of

of *Thomas Norris* and Co. Agents. Cotton yarn and piece goods. No. 3. *Freeman's Court, Cornhill*" — the whole of which was printed, except the words Messrs. *John Schneider* and Co., which were in the handwriting of the defendant. Then followed a list of the articles sold, with the particulars and quantity, and the prices annexed. On the 23d of *December* the plaintiffs demanded the yarn from the defendant, who refused to deliver it, alleging that his principal had declined performing the contract. It was objected upon this evidence, that there was not any note or memorandum in writing of the bargain as required by the statute of frauds; in answer to which the case of *Saunderson v. Jackson* (a) was relied on. His Lordship overruled the objection, and thereupon the plaintiffs obtained a verdict.

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against  
NORRIS.

*Topping* moved to set aside the verdict, and enter a nonsuit, renewing his objection; and as to *Saunderson v. Jackson*, he said that besides the printed bill of parcels there was a letter written by the defendants in that case; and therefore the Court agreed that although the letter, which did not state the terms of the agreement, would not alone have been sufficient, yet as the jury had connected it with the bill of parcels, and the letter was signed by the defendants, there was a written note or memorandum of the order which was originally given by the plaintiff, signed by the defendants, which took the case out of the statute of frauds. In this case there is no proof of any signature by the defendant, and the statute expressly requires that "some note or memorandum in writing be made and signed by the

(a) 2 B. & P. 238. See 1 N. R. 254. per *Shepherd* Serjt. arguing so.

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parties to be charged, or their agents (a). The term signing has a peculiar and appropriate meaning, and may be defined a ratifying by writing; but printing is not equivalent to writing. The law distinguishes in many cases between matters written, printed, and ingrossed. Thus Lord Coke in his comment on the words "*except the same bargain and sale be made in writing,*" in the statute of inrolments, 27 H. 8. c. 16 (b), says, "it must be by writing, and not by print or stamp." So the stat. 44 G. 3. c. 98. s. 24. distinguishes between things required by law to be engrossed, printed, or written. Again, Lord Coke says, "a deed signifieth an instrument in writing (c); it must also have the name of the party to be bound by it." In like manner here the note must be in writing, and must be signed by the party to be charged, or by his agent, that is, his own name must be signed; and the name of another written without any authority is not equivalent. It is for the protection of the party to be charged that a signature is required, and therefore no substitution ought to be allowed.

LORD ELLENBOROUGH C. J. I cannot but think that a construction, which went the length of holding that in no case a printing or any other form of signature could be substituted in lieu of writing, would be going a great way, considering how many instances may occur in which the parties contracting are unable to sign. If indeed this case had rested merely on the printed name, unrecognized by, and not brought home to the party as having been printed by him, or by his authority, so that the printed name had been

(a) Car. 29. c. 3. s. 17.

(b) 2 Inst. 672.

(c) Co. Lit. 171. b.

unappropriated to the particular contract, it might have afforded some doubt, whether it would not be intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance, as if he had written *Norris and Co.* with his own hand. He has by his handwriting in effect said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract. I entertained the same opinion at the trial, and cannot say that it has been changed by the argument. It appears to me, therefore, that the printed name thus recognized is a signature sufficient to take this case out of the statute.

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LE BLANC J. Suppose the defendant had stamped the bill of parcels with his own name, would not that have been sufficient? Such a stamping, as it seems to me, if required to be done by the party himself or by his authority, would afford the same protection as signing.

BAYLEY J. This case is entirely out of the mischief of the statute, the object of which was to protect parties from being bound by contracts, unless it could be seen that the terms on which they contracted were under their signature. Here the terms of this contract are recognized by the defendant, who is the party to be charged, by his signing the name of *Schneider and*

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Co., which is a sufficient signing by him to recognize that they had bought, and he had sold.

DAMPIER J. In *Saunderson v. Jackson* it did not appear that there was any signature to the bill of parcels, it was only by connecting the letter with the bill of parcels, that the case was taken out of the statute. Here there is the hand-writing of the party to be charged to the bill of parcels, which authenticates it as a memorandum of the bargain. The defendant has ratified the sale to *Schneider* and Co. by inserting their name as buyer to a paper in which he recognizes himself as seller. That is sufficient to satisfy the object of the statute.

Rule refused.

Wednesday,  
Jan. 26th.

FALKNER and Others against RITCHIE.

Insurance on ship, and the ship during her voyage while loading her homeward cargo was seized by the crew and carried away to a distant country, and her cargo plundered, and the ship deserted, but was afterwards retaken by another ship, and was brought with a small remaining part of her cargo to an *English* port, (not the port of her destination,) and part of her rigging was gone, and she could not be made fit for a voyage again without considerable expence in providing a crew and stores: Held that this was not a total loss so as to entitle the assured to abandon after notice of the recapture.

ACTION upon a policy of assurance on ship at and from *Cadiz* to any ports or places on the coast of *Africa* and the *African* islands during her stay and trade there, and thence to *Cadiz* or *Lisbon*. Loss by barratry of the mariners. The cause was tried at the last *London* sittings, upon admissions, which stated in substance that the ship sailed on the 11th of *October* 1812, on the voyage insured, and arrived on the coast of *Africa*, and there landed a part of her outward cargo, and procured an exchange cargo. In *March* 1813, while she was engaged in loading her exchange

cargo,

cargo, the master being ashore, the crew seized the ship, cut her cables, and set sail with her from the coast of *Africa*, and carried her to *Seara* bay on the coast of *South America*. There, after plundering the cargo, they deserted her, except one black man; and in *June* following an *American* ship, prize to a private ship of war belonging to *London*, being in the bay, and being informed that she was an *American* prize vessel, put a part of the crew of the ship of war on board, who carried her off from thence, with a small part of her cargo then remaining, to *England*. She reached *Scilly* on the 29th of *July*, and afterwards arrived at *London* on the 6th of *August*, under the care of the persons so put on board, and remained in possession of the owner of the privateer. On the 4th of *August* the plaintiffs received intelligence for the first time of the loss and re-capture, and gave notice of abandonment, which the defendant declined to accept. Part of her rigging was gone, and she could not be made fit for the voyage again without considerable expence and providing a crew and stores.

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The defendant had paid into court what he contended was sufficient to cover a partial loss; but that was disputed by the plaintiffs; and referred to an arbitrator in case they were entitled only to a partial loss; but the plaintiffs also claimed a total loss under the abandonment, and his Lordship being against them on that point, it was agreed that a verdict should be entered for the defendant, subject to be vacated and entered for the plaintiffs, according to the direction of the arbitrator; and with leave, in the mean time, for the plaintiffs to move to enter the verdict for a total

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loss, if the Court should be of that opinion; which would render the arbitration unnecessary.

*Scarlett* accordingly moved for that purpose, and relied on *Goss v. Withers* (a), which he contended was in point, being an insurance on ship, and an abandonment under circumstances nearly the same, after a capture and recapture; and the Court held that the loss was total by the capture, and the right which the owner had, after the voyage was defeated, to obtain restitution of the ship, paying salvage to the recaptor, might be abandoned. So in *Hamilton v. Mendes* (b), which was adjudged not to be a case of abandonment, because there the ship and cargo had, by the recapture, been brought safe to the port of delivery, Lord *Mansfield*, nevertheless, recognized the principle on which *Goss v. Withers* was decided. His Lordship said "that it did not necessarily follow, because there had been a recapture, that therefore the loss ceased to be total. If the voyage be so defeated, as not to be worth the farther pursuit, or if the salvage be high, and the other expences great, the assured may abandon." To try the present case by that principle, it may be said if the recapture and bringing of the ship to *England* have made the necessary expences of redeeming her and renewing the voyage so great as to exceed the probable return, the voyage is defeated, being no longer worth pursuit: and therefore the assured may abandon. Here the recaptors are entitled to salvage, though the amount has not yet been ascertained; and it appears that, without providing an entire new outfit, she could

(a) 2 Burr. 683.

(b) 2 Burr. 1198, S. C. 1 Bl. R. 276.

not be made fit for another voyage. The voyage, therefore, may be truly said to be utterly lost; and the insurance being on the voyage, the assured may abandon.

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LORD ELLENBOROUGH C. J. We decided this case in effect within these three days (a). And so in *Anderson v. Wallis* (b), the loss of the voyage was as complete as in this case: that was an insurance on goods; the ship had been driven by stress of weather into *Kinsale*, and the goods were forced to be relanded, and the voyage was lost for the season. The question was, whether the assured could abandon; and it was held that a retardation of the voyage was not a ground of abandonment, the goods still subsisting in specie. And in *Everth v. Smith*, to which I at first alluded, the Court recognized that decision, and applied it to a case of freight, and held that a loss of the voyage contemplated by the assured was not a loss of the freight, freight having been afterwards earned. As to *Goss v. Withers*, there may be some doubt whether it is similar to the present case; and I must say that there is a looseness and generality in the expressions which have been borrowed in argument from that and the other case, that make one inclined to pause upon them. What has a loss of the voyage to do with the loss of the ship? On this subject there is so much good sense in the judgment of C. J. Willes in *Pole v. Fitzgerald* (c) that it may be of great use to resort to it in order to purify the mind from these generalities.

BAYLEY J. referred to *Parsons v. Scott* (d).

*Per Curiam,*

Rule refused.

(a) See *Everth v. Smith*, ante, 278.

(c) *Willes, R.* 641.

(b) *Ante*, 240.

(d) 2 *Taunt.* 363.



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*Wednesday,  
Jan. 26th.*GRAHAM and Another *against* GRILL.

Upon a *capias utlagatum* on mesne process under which the sheriff has seized and taken an inquisition, but there has been no *venditioni exponas*, the sheriff is not entitled to poundage.

UPON outlawry by the plaintiffs against the defendant on mesne process out of this court, a *capias utlagatum* was issued against the body and goods, under which the sheriffs of *London* seized some property, which upon inquisition was found to be the property of the defendant. Afterwards and after the transcript of the outlawry had been carried into the Exchequer, but before a *venditioni exponas*, a claim was interposed by the assignees of the defendant, who had been declared bankrupt after the inquisition, which claim staid further proceedings in the Exchequer; and in *Easter* term last this Court made a rule for reversing the outlawry upon payment of costs as well in the Exchequer as in this court, to be taxed by the master (a). Upon the taxation of those costs the Master disallowed the following sums, which had been paid by the plaintiffs, viz.

19*l.* 10*s.* For the valuation and inventory.

41*l.* 10*s.* Sheriff's poundage on the seizure, and

78*l.* 10*s.* Paid to the officer for his possession at 5*s.* per day.

A rule was thereupon obtained for the Master to review his taxation. And now upon shewing cause it appeared by the affidavit, that the Master had allowed such a sum in respect of the first charge, as he in his discretion thought sufficient, and so that charge was no further insisted upon; and the last charge was also abandoned on the authority of *Bilke v. Havelock* (b).

(a) 1 *M. & S.* 409.

(b) 3 *Camp. N. P. C.* 374.

*Marryat* shewed cause as to the remaining charge, and referred to *Wildshiere's case* (a), where it was agreed by the whole Court, that for executing a *capias utlagatum*, no fee is due to the sheriff. And the reason is, because it is at the suit of the king (b). And though stat. 3 G. I. c. 15. s. 3. gives poundage in certain cases to the sheriff for levying debts due to the king, it does not make any provision for this case; and therefore it falls under the general rule, that where a duty is cast upon any one by act of parliament, and no remuneration provided for the doing it, the party is bound to perform the duty without remuneration. In *Rex v. Palmer* (c), it was considered that the sheriff was not entitled to poundage, upon a levy under an attachment for nonpayment of money, there being no practice to warrant it. Here indeed it is stated in the affidavit in support of the rule to be the practice of the sheriffs of *London* to take poundage on goods seized under a *capias utlagatum*, but it appears by the affidavit contra, that on a *capias utlagatum* into *Middlesex* on this very outlawry, no charge was made for poundage on behalf of the sheriff of that county, in respect of the seizure and inquisition,

*Taddy* contra, took a distinction between *Wildshiere's case* and the present, that there it appeared to be the suit of the king himself, and therefore no fee was due to the sheriff; yet it is otherwise where it is the suit of the party. And outlawry in a personal action has been considered as a proceeding for the benefit of the party. Therefore case will lie for the party against the

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(a) *Hall*. 52. S. C. *Litt. R.* 65. (b) *Imp. Off. of Sheriff*, 129. 3d edit.  
 3 *Brownl.* 283. (c) 2 *East*, 411.

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sheriff for an escape, upon a *capias utlagatum* on mesne process, *Bonner v. Stokely* (a), and *Cooke v. Champness* (b); or debt for an escape on a *capias utlagatum* after judgment, *Wolf v. Davison* (c). And so in *St. John's College v. Murcott* (d), *Lawrence J.* said that in *Greaves v. D'Acastro* (e), *Rex v. Southey* (f) and *Rex v. Pritchard* (g), a distinction was taken between proceedings at the suit, and for the benefit of the crown, and an outlawry in a civil suit; and in the latter instance it was ruled that the landlord ought to be satisfied a year's rent, because a *capias utlagatum* at the suit of the party is only to be considered as a private execution." Upon the same distinction the sheriff here is entitled to poundage. And by stat. 29 *Eliz. c. 4.* it is enacted that the sheriff shall not take for executing any extent or execution on body, lands, or goods, more than 12*d.* for every 20*s.* &c.; and a *capias utlagatum* is an execution on body and goods; and here it was executed on the goods: or if it be an extent, it is laid down in *Com. Dig.* (h), that the sheriff shall have fees for money levied upon an extent out of the Exchequer.

LORD ELLENBOROUGH C. J. In the case alluded to upon the statute of *Anne*, where the landlord was allowed his year's rent, the Court seem to have been of opinion that the *capias utlagatum* was an execution within that statute (i). But is there not this difficulty here, that there has been no levy of the money, and

(a) *Cro. Eliz.* 652.(b) *Fitzg.* 265.(c) *Salk.* 319.(d) 7 *T. R.* 259.(e) *Bamb.* 194.(f) *Ib.* 5.(g) *Ib.* 269.(h) *Viscount, (F. 1.)*(i) *Greaves v. D'Acastro, Bamb.* 194.

therefore supposing a *capias utlagatum* to come within the words extent or execution in the statute of *Eliz.*, must not the money be levied in order to entitle the sheriff? The right of the sheriff to poundage is a right merely *positivi juris*, and unless expressly conferred by the act of parliament, he cannot claim it. It is not in the nature of a claim for work and labour. The *capias utlagatum* is in its original form for the punishment of the party's contumacy, and not for the payment of a debt, and the language of the statute does not seem to extend to this proceeding. There are many onerous duties cast on the sheriff, for which the law has not provided distinctly any remuneration, and this is one reason for appointing men of substance to the office, that they may be able to bear those duties.

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 against  
 GRILL.

BAYLEY J. Upon a *capias utlagatum* the sheriff is commanded to take all the goods, as well as the body. By what then is the poundage to be measured? A party may be outlawed for a debt of 100*l.*, and his property taken may amount to 10,000*l.* Is the poundage in such case to be estimated upon the 100*l.* debt only or upon the whole 10,000*l.*?

*Per Curiam,*

Rule discharged.

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*Thursday,*  
*Jan. 27th.*SOLLY and Another *against* RATHBONE and Others.

Where plaintiffs consigned goods to their factors, who not having funds to pay the freight and duties, agreed with defendants that they should take charge of the consignment, pay the freight and duties, and sell the goods, and have one half the usual commission on such sale; and defendants accordingly paid the freight and duties, and received the goods, after which the factors became bankrupt, having before informed defendants that the goods were the plaintiffs', but defendants notwithstanding sold the goods: Held that on trover by the plaintiffs, the defendants had not a right to retain for the freight and duties after deducting the balance due from the factors to the plaintiffs at the time of the bankruptcy.

**T**ROVER for timber. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last term, it appeared that the plaintiffs, who were foreign merchants, resident at *Dantzic*, consigned the timber in question to *Clegg* and *Whitby*, their factors at *Liverpool*. *Clegg* and *Whitby*, being in embarrassed circumstances, and not having funds of the plaintiffs' in their hands adequate to pay the freight and duties, proposed to the defendants, who were merchants of the same place, that they should take charge of the consignment, and pay the freight and duties upon landing, and sell the same; *Clegg* and *Whitby* agreeing to give them one-half the usual commission on such sale. The defendants, who were apprized that *C.* and *W.* were mere factors, acceded to these terms, and accordingly paid the freight and duties, amounting to 2200*l.*, and received the timber. *Clegg* and *Whitby* soon afterwards became bankrupts, having previously informed the defendants that the consignment belonged to the plaintiffs; one of whom having arrived in *England* the defendants wrote to him for instructions, but before they got an answer from him made sale of a part of the timber. An answer was afterwards received from him, denying that they had a lien on the cargo for their advances; after which they sold the residue, and, on demand made, claimed to retain to the amount of the advances for freight and duties, after deducting the balance due from *Clegg* and *Whitby* to

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the plaintiffs at the time of the bankruptcy. It appeared that this balance was about 1200*l.* at the time of the bankruptcy; of course, if the freight and duties had been brought into the account the plaintiffs would have owed *Clegg* and *Whitby* the difference, for which the defendants claimed a lien. The plaintiffs had not made any tender of this sum before the action. A verdict was given for the plaintiffs, under his Lordship's direction.

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against  
RATHBON.

*Scarlett* moved for a new trial, on the ground that this was not a case of pledge by the factor. He admitted that if it were, the pawnee could not derive any rights under it to the prejudice of the principal, because the rule is that a factor cannot pledge. But here the advances were made by the defendants on the behalf of *Clegg* and Co. for the benefit of the principal, and in furtherance of the commission with which *Clegg* and Co. were entrusted, and which their embarrassments prevented them from executing. And, therefore, this case falls within the exception noticed by the Court in *Martini v. Coles* (a); Lord *Ellenborough* C. J. there said, that "if the defendants had advanced money for any purposes connected with the sale, and for which brokers in the ordinary course of disposing of goods are accustomed to advance it, they would have had a lien in respect of such advance;" and the language of *Le Blanc* J. is, "that if the advances were made to take up the bill of the consignor, and were appropriated to that purpose, that might be considered in furtherance of the

(a) 1 M. &amp; S. 140.

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authority given by the principal." This indeed was not an advance to answer the consignor's bill, but it was strictly for a purpose connected with the sale; if *Clegg* and Co. had been solvent, and made the advance themselves, they would clearly have had a lien; not being so, they propose to the defendants to do that for them, and to become their partners or appointed agents; and in this way it was competent to *Clegg* and Co. to transfer their lien to them. In *McCombie v. Davies* (a), which was held to be a case of pledge, Lord *Ellenborough* C. J. expressly declared that his observations applied to a *tortious* transfer by the broker undertaking to pledge the goods of his principal as his own, and not to the case of one who, intending to give a security to another to the extent of his lien, delivers to him the goods with notice of his lien, and appoints him as his servant to keep possession of the goods.

LORD ELLENBOROUGH C. J. This is a case in which the actual factors, being insolvent and unable themselves to make the necessary advances upon the consignment sent to them, agreed with the defendants, the associated consignees, without the authority or knowledge of the consignors, to divide the commission between them; all which was in breach of their duty to the consignors, and in fraud of them. Supposing, therefore, the defendants are entitled under the circumstances to some relief, and that an action for money had and received would lie, and I do not pronounce whether it would or would not, there is

(a) 7 East, 5.

certainly

certainly not any privity between these parties. What have the consignors of these goods to do with that which passes between *Clegg* and Co. and the defendants in contravention of the trust reposed in them? It seems to me that there is nothing to impeach the verdict.

*Per Curiam,*

Rule refused (a).

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SULLY  
against  
RATHBONE.

(a) The following case was argued and determined at *Serjeants' Inn*, before *Easter* terms 1813, and judgment afterwards given in the term.

COCKRAN, Assignee of CAMPBELL and ORR, bankrupts, against IRLAM, and Others.

*Tuesday,*  
*May 11th.*

ACTION for money had and received to the plaintiff's use. Plea, the general issue. At the trial before Lord *Ellenborough* C. J. at the sittings after *Michaelmas* term 1811, a verdict was found for the plaintiff for 134*l.* 18*s.* 5*d.* subject to a private adjustment, as to the actual amount, to be made between the parties; and subject to the opinion of the Court on the following case:

The bankrupts, *Campbell* and *Orr*, who were butter merchants at *Newry* in *Ireland*, employed *M<sup>c</sup>Camley* at *Liverpool*, as their general agent; to whom they consigned their butter for sale upon commission, he guaranteeing the payment. As each consignment was made, *Campbell* and *Orr* used to draw bills upon *M<sup>c</sup>Camley* in anticipation of the sales; which bills *M<sup>c</sup>Camley* uniformly accepted. *M<sup>c</sup>Camley* being unable to find a market himself, was in the habit of disposing of part of the butter thus consigned to him by *Campbell* and *Orr* as well as by other of his correspondents, by placing it in the hands of *Hutchinson* a merchant in *Liverpool*; who made the sales in his own name, and received the money as it became due, guaranteeing the payment to *M<sup>c</sup>Camley*. *Hutchinson* was aware that *Campbell* and *Orr* used to draw upon *M<sup>c</sup>Camley* in advance, and that he accepted their bills; and the same course of drawing and acceptance was adopted between him and *M<sup>c</sup>Camley*, in respect of this butter, and the bills of lading and particulars of the butter were uniformly deposited with *Hutchinson*, without being indorsed by *M<sup>c</sup>Camley*. The whole of this dealing between *M<sup>c</sup>Camley* and *Hutchinson* was entirely unknown to *Campbell* and *Orr*; as was also an agreement existing between *M<sup>c</sup>Camley* and *Hutchinson*, that the commission charged to their (C. and O.'s) account

Where C. consigned goods to M<sup>c</sup>. their broker, upon a del credere commission, for sale, and drew bills on him in advance, which M<sup>c</sup>. accepted but never paid, and afterwards, without the knowledge of C., placed the goods with H., another broker, upon a del credere commission, and upon an agreement to divide the commission with him, and obtained his acceptances for the amount, and H. sold the goods, and afterwards became bankrupt, and his assignees

received the proceeds of those sales, and the acceptances of H. were proved under his commission, and a dividend received upon them: Held, that the assignees of H. were liable to the assignees of C., who had also become bankrupt, for the amount of the proceeds, in an action for money had and received.



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IRLAM.

by *McCamley*, should be divided between the two. Before October 1810 *Campbell* and *Orr* made several consignments of butter to *McCamley*, and drew bills upon him as usual in advance; and *McCamley*, in the usual way also, deposited those consignments with *Hutchinson* together with the bills of lading directed to *McCamley* or assigns, and undersigned; and drew upon him for the amount; and *Hutchinson* sold the same in the usual manner. On the 28th of October *Hutchinson* became bankrupt, and the defendants were chosen his assignees; and the bills so drawn upon and accepted by him, were afterwards proved under his commission by bona fide holders from *McCamley*, and dividends declared and received upon them. Soon after *Hutchinson's* failure *McCamley* became bankrupt; and on the 5th of December following *Campbell* and *Orr* also became bankrupts; and the bills so drawn upon and accepted by *McCamley*, when due were delivered up by the holders to the plaintiff, (who is the sole assignee under the commission of *Campbell* and *Orr*.) without any consideration; and no proof has been made upon them under *McCamley's* commission. The holders of the bills who in respect thereof are the principal creditors of *Campbell* and *Orr*, delivered them up in discharge of *McCamley's* estate, as it will be more beneficial to them to increase the dividends under *Campbell* and *Orr's* commission, if the present action is maintainable. The £348l. 18s. 5d. is the sum received by the defendants, as assignees of *Hutchinson*, on account of the above mentioned sales made by him. The question for the opinion of the Court is, whether the plaintiff is entitled to recover; if he is, then the verdict is to stand; if not, a nonsuit to be entered.

*Scarlett* for the plaintiff, contended that the assignee of *Campbell* and *Orr* was entitled to recover from the assignees of *Hutchinson* the proceeds of the sales made by *Hutchinson* without the knowledge and consent of *Campbell* and *Orr*. Without their consent, *McCamley*, who stood in the relation of broker, had no authority to transfer the consignments made to him in that character to another broker, so as to bind his principals by such transfer; and therefore the acts of *Hutchinson* done in pursuance of such transfer, were as to *Campbell* and *Orr* unauthorized acts; and the proceeds of the sales were monies in his hands belonging to them. And the circumstance of *McCamley* having given his acceptances will not vary their right to recover; because the bills have never been proved under his commission, and his estate is no more affected by them than if they had never existed.

*Littledale* contra insisted, that if a principal placed goods with his broker for sale upon a del credere commission, drawing upon him by anticipation for the amount, and the broker instead of selling them himself, employs another broker to sell for him upon a similar guarantee, and obtains his acceptances in advance, which acceptances are afterwards paid, the broker who sells the goods is clothed with the same rights of retaining against the principal, that he would have against his immediate employer; and therefore as *Hutchinson* might have

have retained against *McCamley* to the extent of his acceptances, so he might do against *Campbell* and *Orr*. If *Hutchinson* is not entitled to such an extent, he is at all events entitled to stand in the situation of *McCamley*, who has given his acceptances to *Campbell* and *Orr*; for which they must be presumed to have received value when they parted with them. This mode of dealing between brokers is according to the common course; and seems to have been recognized in *Bramley v. Caswell* (a).

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COCKRAN  
against  
IRLAM.

LORD ELLENBOROUGH C. J. A principal employs a broker from the opinion he entertains of his personal skill and integrity; and a broker has no right without notice to turn his principal over to another of whom he knows nothing. It appears to me therefore that there is no privity either express or implied, between *Campbell* and *Orr*, and *Hutchinson*. There certainly was not any express privity; neither can any be implied, unless the case had found that the usage of trade was such as to authorize one broker to put the goods of his employer into the hands of a sub-broker to sell, and to divide the commission with him. It is said however that *Campbell* and *Orr* drew bills on their broker for these goods, and that afterwards they received value for them; but the case fails in establishing that point.

Per Curiam,

Judgment for the plaintiff.

(a) 2 Bos. &amp; Pull. 438.

### MOORSOM and Another against KYMER and Others.

Friday,  
Jan. 28th.

**ASSUMPSIT.** The plaintiffs declare that they were owners of the ship *Lavinia*, which, by a charter-party of affreightment, had been chartered by *Greaves and Co.* for a voyage from *London* to the islands of *St. Thomas* and *St. Domingo*, and back to *London*, for certain freight, and on certain terms and conditions; that the ship had performed the said voyage, and had received on board at *St. Domingo* divers goods, which,

Where a ship was chartered on a voyage out and home for a specified time at a certain rate of payment on the homeward cargo in full for the hire of the ship for the said time, to be paid in part by an advance on the

ship's clearing for the outward voyage, and the rest on her return, by bills payable at a future day, and on the loading the homeward cargo a bill of lading was signed to deliver the goods to the charterers or their assigns, he or they paying freight for the said goods as per charter-party: Held that the indorsees of the bill of lading, for valuable consideration, were not liable to the ship owner upon an implied assumpsit to pay the freight arising out of the receipt of the goods under the bill of lading.

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by virtue of bills of lading signed for the same, were to be delivered at *London* to *Greaves and Co.*, or to their assigns, he or they paying freight for the said goods and merchandizes as per charter-party, with primage and average accustomed; and that the goods had been carried from *St. Domingo* to *London*, and there lodged in a warehouse at the *West India* docks, subject to the lien of the plaintiffs for the freight, whereof the defendants had notice; that the defendants had become the indorsees of the said bills of lading and the assigns of *Greaves and Co.* in respect to the said goods, and entitled to the delivery thereof on paying freight for the same as per charter-party, with primage and average accustomed; and thereupon, in consideration of the premises, and also in consideration that the plaintiffs would consent to the said goods being delivered to the defendants under the said bills of lading, the defendants undertook to pay the plaintiffs freight for the said goods as per charter-party, with primage and average accustomed. They then aver that, with the consent of the plaintiffs, the goods were delivered to the defendants, and accepted by them under the bills of lading; that the freight, according to the terms and conditions of the charter-party, with primage and average accustomed, amounted to 3000*l.*; the time for the payment of which had long expired: yet the defendants did not nor would pay the said freight, &c. 2d Count; in consideration that the plaintiffs, at the defendants' request, had delivered to them divers other goods, which the plaintiffs had before then carried in a certain ship, whereof they were owners, from *St. Domingo* to *London*, the defendants undertook to pay the plaintiffs freight for the said goods, according

ing to the terms and conditions of a certain charter-party, whereof they had notice, with primage and average accustomed, &c. 3d Count; in consideration that the plaintiffs, at the defendants' request, had permitted to be delivered to them, under and by virtue of certain bills of lading, before then indorsed to them and then in their possession, divers goods, which the plaintiffs before that time had carried in a certain ship, whereof they were owners, from *St. Domingo* to *London*, and that the goods had been accordingly delivered, the defendants undertook to pay the plaintiffs freight, primage and average, for the goods, in manner mentioned in the said bills of lading, &c. There were also counts in *indebitatus assumpsit* for freight, primage and average, and for the use of the ship; and the common money counts. Plea, general issue. At the trial before Lord *Ellenborough* C.J. at the *London* sittings after last *Trinity* term, the jury found a verdict for the plaintiffs for the sum of 3000*l.* subject to the opinion of the Court upon the following case :

The plaintiffs are the owners of the ship. By charter-party under seal, dated the 3d of *July* 1809, between the plaintiff *Moorsom*, as part-owner, and *Greaves and Co.*, *Greaves and Co.* chartered the ship for the voyage described in the declaration, and if required to the *Mediterranean* before returning to *London*, to deliver her outward cargo at *St. Thomas*, and take in goods at *St. Domingo*; and it was stipulated (amongst other things) that the goods should be delivered at *London*, agreeably to the bills of lading. And *Greaves and Co.* covenanted with *Moorsom* that they (the freighters), their executors and administrators, would take the brig from the 21st of *July* for eight calendar months, and provide at *St. Domin-*

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go a cargo of coffee in bags, together with such a quantity thereof in casks as they might think proper to ship, not exceeding the number of 50; and would pay to the said owner, his executors, administrators, or assigns, freight for the same at and after the rate of 15s. sterling per hundred weight in bags, and 16s. per hundred weight in casks; together with five per cent. primage thereon; such freight and primage being in full for the freight or hire of the said brig for the eight calendar months, and to be paid in manner following, viz. 600l., part thereof, on the day the brig should be cleared outwards at the custom-house in *London* on her said voyage, by bill or bills payable two months after date, and the remainder, if she should return to *London* direct without proceeding to the *Mediterranean*, by good and approved bills payable ten weeks after date, from the day she should be reported at the custom-house there. The ship having delivered her outward cargo at *St. Thomas's*, proceeded to *St. Domingo*; and there, by order of the charterers, took in a cargo for *London* direct. The coffees, for the freight of which this action is brought, were shipped at *St. Domingo*, and bills of lading were signed, stating them to be shipped by *J. D.* on the account and risk of *Greaves and Co.* to be delivered in the port of *London* to *Greaves and Co.* or their assigns, he or they paying freight for the said goods, as per charter party, with primage and average accustomed. The ship likewise took in at *St. Domingo* other goods, consigned by similar bills of lading to other persons in *London*: from whom the plaintiffs received the stipulated freight. The ship, with her homeward cargo, arrived at *London*, and was reported, and entered the *West India* docks on the 20th June

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1810. Before any part of the cargo was discharged, bills of lading for the coffees were indorsed, for a valuable consideration, by *Greaves* and Co. to the defendants; and the coffees, before any part of them was discharged, were, by virtue of these indorsed bills of lading, transferred in the books of the *West India* Dock Company, into the names of the defendants. They were likewise entered at the custom-house in the defendants' names, and landed, and the duties upon landing were paid by the defendants. They were then lodged in the warehouses of the *West India* docks in the defendants' names, and afterwards delivered out to their order. On the 14th of *July* *Greaves* and Co. stopped payment, and in *August* the plaintiffs sent in a freight-note, or account of freight, to *Greaves* and Co., that they might compare it with the charter-party. In *September*, after the delivery of the ship, the defendants being considered as personally liable as having entered the goods under the above circumstances, were called upon to settle the freight of the coffees, at the rate of 15s. per hundred weight in bags, and 16s. per hundred weight in casks, as stipulated in the charter-party: but they refused to do so, alleging that they had made heavy advances for *Greaves* and Co. The sum of 3000*l.* is agreed to be the amount of the freight upon the coffees at the rate aforesaid, subject to such (if any) deductions as may be made by an arbitrator named by the parties.

If the Court is of opinion that the plaintiffs are entitled to recover, the verdict is to stand; otherwise a nonsuit is to be entered.

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*Campbell* for the plaintiffs, contended that the defendants, by receiving the coffees under the bills of lading, which made the goods deliverable to the consignees or their assigns, he or they paying freight according to the charter-party, had virtually undertaken to pay such freight. He said that if the defendants had been the consignees, instead of indorsees of the bills of lading, there could not have been a doubt that by the receipt of the coffees they would have made themselves debtors for the freight, and for this he cited *Roberts v. Holt* (a), and *Leer v. Yates* (b). And there is no difference in point of law between consignees, and assigns of the bill of lading; the latter are clothed with the same rights, and might sue the captain or owner for non-delivery of the goods, and therefore shall be subject to the same liabilities. The cases of *Lodergreen v. Flight* (c), *Cock v. Taylor*, (d) and *Bell v. Kymmer* (e), all shew that the indorsees of the bill of lading are liable for the freight; and in *Wilson v. Kymmer* (f) it seems not to have been doubted upon the first motion for a new trial, that the defendants, who were indorsees, would have been answerable for the freight if they had received the goods under the bill of lading, but the Court took the distinction that they had received them under an order of the consignees and not under the indorsement of the bill of lading: but upon the second trial the Court held them liable. It is true that there is a charter-party in this case, and therefore it may be said, according to *Penrose v.*

(a) 2 Shew. 443.

(b) 3 Tamm. 387.

(c) Cited in *Hansen v. Meyer*, 6 East, 622. and also by *Bayly J.* in *Cock v. Taylor*, 13 East, 403.

(d) 13 East, 399.

(e) 3 Camp. N. P. C. 545.

(f) 1 M. &amp; S. 157.

*Wilkes,*

*Wilkes (a)*, that the plaintiffs might have sued the charterers for the freight; but the effect of that is not to do away the liability of the defendants under the bill of lading, but only to qualify that liability, by making the freight payable agreeably to the terms of the charter-party. In *Lodergreen v. Flight*, *Wilson v. Kymer*, and *Bell v. Kymer*, there were also charter-parties, and in *Penrose v. Wilkes*, so far from its being doubted whether the existence of a charter-party did away the liability of the indorsee under the bill of lading, Lord *Kenyon* at first ruled that the captain could not sue the charterer for the freight, on the ground that he ought not to have delivered the goods without having the freight paid. Upon the second trial, indeed, he held otherwise in conformity with the opinion of the Court; and so it was afterwards holden in *Tapley v. Martens (b)*, and *Christy v. Rowe (c)*. But the very doubt on which those cases turned shews à fortiori that the captain might have looked to the consignees or their assigns for the freight. Nor is there any rule by which this implied contract is merged in the specialty; because the rule respecting merger only applies as between the same parties, but here the defendants are not parties to the specialty. And for this reason it was adjudged in *Hooper's case (d)* that the defendant could not wage his law. So in 1 *Leon*. 293. *Anon.* it was holden that assumpsit would lie by the husband for arrears of a rent charge due to the wife in her lifetime upon a promise made to the husband, although the

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(a) Cited by Lord *Ellenborough* C. J. in *Shepard v. De Bernales*, 13 *East*, 570.

(b) 8 *T. R.* 451. 13 *East*, 571.

(c) 1 *Tenn.* 300.

(d) 2 *Leon.* 110.



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rent was payable by deed; and the Court said that the husband had remedy by stat. 32 H. 8., and therefore the consideration was sufficient. And so it may be said here, the captain had remedy by lien on the goods, and he has waived that lien in favour of the defendants, and therefore there is a sufficient consideration for an implied promise. The charter-party by providing a specific mode of payment did not destroy the lien; if the bills had been given, it may be, according to *Cowell v. Simpson* (a), that the lien would have been at an end; but it was a continuing lien until the bills were given. The giving security for a debt may be a destruction of the party's lien who takes the security, but it has never been held that the mere agreement to give security is of the same force, though it may amount so far to a qualification of the lien as to limit it to the enforcing the giving security. And at all events the benefit which the defendants have derived from the acceptance of the goods was a sufficient consideration. If it should be objected that the plaintiffs, by sending in the freight-note to *Greaves and Co.* have thereby shewn that they meant to look to them for the freight, the answer is furnished by the case, which states that it was sent for the purpose of being compared with the charter-party; and besides in *Wilson v. Kymer* (b), although the plaintiffs had proved the freight due to them on the charter-party under the commission taken out against the charterers, which was much stronger than this, they were, notwithstanding, permitted to recover against the indorsees of the bill of lading.

(a) 16 Ves. 275.

(b) 1 M. &amp; S. 157.

*Taddy*, contra, maintained that there was not any thing in this case to raise an assumpsit in favour of the plaintiffs. He said that the indistinct use of the term freight, had occasioned some confusion in the argument. What is due to the plaintiffs under the charter-party is improperly termed the freight of the goods, being rather the hire of the ship. It is a compensation for the hire of the ship out and home, to be paid by a sum in advance in the first instance, and by a farther sum calculated on the amount of the homeward cargo; but that is not, correctly speaking, freight for the carriage of the goods; and so it was considered by Lord *Hardwicke*, in *Paul v. Birch* (a). And the hardship would be great if the defendants were held liable in this case, because they would be charged with the outward voyage with which they had no concern. There is not any case in which the bare receipt of the goods under the bill of lading by the indorsee, has been held to render him liable for the freight agreed to be paid by the charter-party. *Roberts v. Holt* was the case of a consignee, and it does not appear there was a charter-party. In *Cock v. Taylor* there was no charter-party. The indorsee of the bill of lading may indeed have so conducted himself as to render himself liable; for the objection *prima facie* is that there is a want of privity to raise an assumpsit, but that may be removed by the conduct of the party; and such was the case of *Wilson v. Kymer*. But here it does not appear that the defendants had any dealings with the plaintiffs, or that they had notice of the terms on which the freight was to be paid by the charter-party, or ever as-

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(a) 2 Atk. 612.

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sented to them; but the whole case rests upon their having received the goods. And the plaintiffs having chartered the ship to *Greaves and Co.*, *Greaves and Co.* became the owners pro hac vice, according to *Vallejo v. Wheeler* (a); so that there was not any privity in this respect with the defendants, who are only contractors with *Greaves and Co.* The cases from *Leon.* were cases of express promise, and therefore admit of a clear distinction. As to the lien, it is extremely doubtful whether any such existed in this case; the rule seems to be, that wherever there is an express agreement there is no lien, *Brenan v. Currin* (b), *Collins v. Ongley* (c); and this rule holds more especially where the terms of the agreement, as in this case, are inconsistent with a demand of present payment. And as to the lien being qualified by the agreement, it is enough to answer that not any authority has been vouched for the exercise of a lien to a partial extent only. And supposing there was a lien, as it was never insisted on, it must be taken to have been waived. And besides the lien was not the lien of the plaintiffs but of *Greaves and Co.*, who had chartered the ship, and in whose possession the goods were, and not in the possession of the plaintiffs.

*Campbell*, in reply, admitted the distinction taken in *Paul v. Birch*, but contended that this was properly freight upon the goods. And as to the want of privity, he insisted more particularly on *Cock v. Taylor*, endeavouring to shew from a comparison of the facts of that

(a) *Cowp.* 155. per *Aston J.* (b) *Say. R.* 224. *S. C. Bull. N. P.* 45.  
(c) *Schwyn's N. P.* 1214. 3d edit.

case with the present that both cases stood upon the same grounds as to privity.

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LORD ELLENBOROUGH C. J. This case has been argued to an extent that would embrace almost every case upon record, on a bill of lading or on the subject of freight, within judicial memory. It is extremely dangerous to shake the authority of decided cases, and it is always mischievous unnecessarily to draw into question principles, when the case before the Court does not require it. I shall therefore forbear to enter into that wide field of argument, which has been raised from the cases drawn into discussion. I shall forbear to go into the question how far any lien does or does not exist in this case. The freight, or more properly speaking the compensation for the hire of the ship, is constituted by the agreement between the plaintiffs and *Greaves and Co.*; and whether after the stipulation contained in that agreement, by which the delivery of the cargo is not made to depend on the previous payment of the stipulated hire, nor even on the previous delivery of the bills, the party could stand upon his general right to retain, there is no occasion to consider at present; or how far that which is made the subject of express stipulation may be lawfully eked out and extended by the bill of lading. If the bill of lading refers to the charter-party for the rate of payment, it should seem as if it could not enhance its stipulations and vary the position of the parties. But assuming that the right of lien existed, and that it attached on the goods at the time of their coming into the hands of the indorsees of the bill of lading, the question is whether there was any contract express or implied on the part of the indorsees

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dorsees to pay the freight. It has not been suggested that there was any express contract, to which the cases from *Leon*. would have applied. Has there been any implied contract? From what facts is it to be implied? The landing the goods and paying the duties seem to be the only facts. It does not appear that there was any forbearance on the one side, or security given on the other; but it is to be implied merely from the indorsees receiving the goods from on board the ship, that they signified their acquiescence to become liable in the terms of the charter-party. But why must a contract be necessarily inferred from that? If indeed there had been any previous communication with the defendants as to the plaintiffs' right to demand the freight of them, or as to their consent to waive their lien, that might have raised an inference that the defendants undertook to pay it; but in the absence of any such thing, I do not see on what basis such an inference can be raised, except this, that wherever a party accepts the goods under a bill of lading, the permitting him to take them shall raise an implied assumpsit on his part to pay the freight. I am not prepared to agree to that as an universal proposition, and therefore cannot infer a promise in this case. The not exercising the lien might be either a voluntary recession from the party's right or might be done upon a consideration; but I do not discover any particle of evidence to make it referable to the latter presumption.

LE BLANC J. The question brought before the Court is whether the owners of the ship can maintain any action on the promise, as stated in the declaration, to pay a certain sum for freight or carriage of goods;

which the defendants have received. It is not pretended that there was any actual express promise to pay, but it is contended that under the circumstances of this case the law will necessarily imply such promise. It is not necessary to enter into the consideration of the question whether the owner or the captain who is their servant, could insist on detaining the goods until the freight was paid; because taking that for granted without entering into the question, and desiring to be understood as not determining it in this case, I think there is not any ground to say that the law will infer such a promise on the part of the defendants. The plaintiffs were owners of this ship, which they let to *Greaves* and Co. on a voyage from *London* to *St. Thomas* and *St. Domingo*, there to take on board a cargo of coffee in bags or casks, for which they stipulated to be paid after a certain rate on the coffee brought home; that is, 15s. per cwt. for the coffee in bags, and 16s. per cwt. for that in casks. Such was the contract between the plaintiffs and *Greaves* and Co. In pursuance of that contract *Greaves* and Co. sent the ship to *St. Domingo* to their own agents, who shipped on board a cargo of coffee, and the captain signed bills of lading, whereby he undertook to deliver the coffee to the charterers or their assigns, he or they paying freight for the same according to the charter-party; so that it is clear that the captain was cognizant of the existence of a charter-party. The defendants became the purchasers of the cargo from *Greaves* and Co. before any part of it was discharged, and the bills of lading were indorsed to them, and were produced at the *West India* docks, by virtue of which the coffees

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were transferred into their names; and they paid the duties, and finally received them. Now supposing the owner or captain to have had a lien on the goods, he might have insisted on detaining them until the freight stipulated for by the charter-party was paid, or he might have insisted on preserving his lien by the mode of entering them at the *West India* docks; but it does not appear that any such thing was done; but the defendants were allowed to land the goods and pay the duties without any demand for freight being made, they standing in the situation of indorsees of the bills of lading under the charterers. The rule is, that the law will not raise an implied promise where there is an express agreement between the parties. Then if the defendants are liable as purchasers, it can only be as standing in the same situation as *Greaves and Co.*, who agreed for the payment of a specific freight. Then supposing the plaintiffs might have detained the goods until the specific freight was paid (and it is not pretended that they could have detained for more,) or until the bills were given, if they have not insisted on that right, the law will not raise an undertaking between these parties, where there is another remedy, and it is not necessary for the purposes of justice that it should be raised, but will remit the plaintiffs to their original contract. The late decision of *Cock v. Taylor* has been pressed upon us; but it does not appear that any charter-party existed in that case; the defendant claimed the goods under the bill of lading, but it did not appear that the party under whom he claimed was liable in any way whatever; so that there, if the defendant was not liable, it did not appear that the owner of the ship could have

resorted to any other person. Therefore, taking that to be an authority that where the ship is a general ship, and there is no other to whom the party can have resort, the law will imply a promise, in order to prevent a failure of justice; that is not the case here: here there is no occasion to raise such an undertaking, where there is a clear original contract under seal. The other case of *Bell v. Kymer*, before Sir J. Mansfield, is still sub judice. There, however, this question did not arise, although in the course of the trial the subject was argued. But the action there was not brought by the owners of the ship, but the persons who hired it, and who were the charterers, and stood in the situation of *Greaves and Co.* in this case. There the plaintiffs had no means of resorting to any other persons for the freight. Under the present circumstances it seems to me that the law will not raise an implied undertaking, where there is already an express agreement, as it will not interfere where it is not necessary for the purposes of justice, the ship owners having their remedy left entire under the charter-party.

BAYLEY J. I am of the same opinion. There is not any express contract between the parties; and there are not any facts which would warrant us in raising a contract by implication of law. Mr. Campbell was unwilling in his argument to see the distinction between this and the other cases, but an unbiassed mind may easily see it. The question in *Lodergreen v. Flight* was simply a question on the lien, and, when that was decided, there was an end of all other questions. The Court there held that as the cargo belonged

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longed to the same person, and was under one consignment, and came to one and the same person, the captain had a lien for the whole freight on the remainder of the cargo: *Cock v. Taylor* was the case of a general ship, where there was no special contract between the parties; but only a bill of lading. Mr. *Campbell* has argued, that in that case the shippers would have been liable; I much doubt that; for where the bill of lading expresses that the goods are to be delivered to the consignee or his assigns, he or they paying freight for the same, if the captain deliver the goods to the assigns, without procuring the freight for them, I am not prepared to say that he can resort back to *A. B.*, the shipper, where *A. B.* has never expressly stipulated that he will pay the freight. Therefore, I think that a case in which there is no other contract but the bill of lading, and where the shipper has made no express stipulation for the payment of freight, concludes nothing upon a question where there is an express contract under seal to pay freight. *Bell v. Kymmer* was, as between the parties to the action, like *Cock v. Taylor*; as between them the ship was a general ship. What contract was there in that case by which any person had undertaken to make good the freight to the plaintiffs, the charterers? If there was no contract, then it stood upon the bill of lading, on the same ground as *Cock v. Taylor*. But what is there in the present circumstances to raise any implied contract? I do not meddle with the question, whether the captain had a right of lien. The fact is, the captain delivered the goods without any stipulation. It does not appear that he communicated to the defendants, that he meant to look to them; and

here was a charter-party, by which a person in this country stipulated to pay the freight. The captain does not make any communication to the assignees of the bill of lading; and does not that warrant them in supposing that he means to have recourse to the parties who are liable under the charter-party? That is made abundantly strong in this case; because ten weeks elapsed before any demand was made on these defendants. Another objection to the plaintiffs' right to recover is, that these defendants would have to pay more than the plaintiffs were entitled to receive; by reason that they have already received 600*l*.

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DAMPIER J. I am entirely of the same opinion. This case has been so fully gone into that it will only be necessary for me shortly to state the few grounds of my opinion. This is a case where there is an express contract under seal; and there is not any case which shews that where an express contract subsists with a third person for the payment of freight, the mere fact of receiving the goods has raised an implied promise by the person who receives them to pay the freight. That would be laying down a very extensive proposition. I admit, for the argument's sake, that the captain had a lien; he has, however, waived that lien. Is then that waiver a circumstance from which a promise is to be implied? The captain did not give any notice to the defendants when they took the goods that he would look to them for the freight; but, making a voluntary waiver of his lien, he permits the goods to be removed, looking for the freight to the person to whom the contract naturally led him. If he had said, I will not part with the

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'cargo unless you undertake to pay me the freight, there would have been a consideration, and to that point some of the cases are applicable. Here, however, there is a total absence of any evidence of that sort; there was no stipulation, nor any demand made of the freight. And what has been observed by my brother *Bayley*, that the plaintiffs can have no right to demand freight at the rate of 15s. and 16s., because 600*l.* have been already received, is material. The difficulty which I felt on the first reading of this case has not been removed by the argument; which has not shewn that any assumpsit can be implied to pay the freight: where there is an express contract, binding one party to pay, so that the other may look to the charter-party for the freight, there is not any occasion to raise an implied assumpsit. *Expressum cessare facit tacitum.*

BAYLEY J. added, that he had omitted to observe, that *Wilson v. Kymer* was decided entirely on the usage.

Judgment of nonsuit.

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The KING *against* W. JAMES and Others.*Saturday,  
Jan. 29th.*

A RULE nisi was obtained in the last term for quashing an order of sessions, allowing the accounts of the overseers of the poor of the parish of *Croydon*, in the county of *Surry*, upon appeal against them by the defendants at the last *Midsummer* sessions. The order of sessions was upon the face of it general, allowing the said accounts, and dismissing the appeal, and farther ordering that the appellants should pay to the overseers 40s. costs. The defendants in their affidavit, on which the rule was obtained, disclosed several grounds of objection to these accounts; 1st, that they contained charges of sums in gross as monthly payments, without stating the several items of expenditure which made up the gross amount, some of which items were stated to be for charges illegal or excessive; 2dly, that they contained a charge for a salary to one of the overseers, &c.

This Court will not, upon removal of an order of sessions allowing overseers' accounts, which is good upon the face of it, go into the merits of those accounts upon affidavit.

And now the rule coming on, Lord *Ellenborough* C. J. interposed by inquiring if there was any objection to the order upon the face of it; for otherwise the Court would not go into the overseers' accounts upon affidavit. The sessions was the proper forum for deciding such matters; the time of the Court would otherwise be absorbed in taking parish accounts.

*The Attorney-General* and *Lawes*, in support of the rule, admitted the inconvenience that would follow from entertaining motions to revise the overseers' accounts, if the practice were general; but urged, on the other hand, the great injustice that might be done

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if there was no relief against accounts so made up as the present, without specifying any particulars. And they referred to *Rex v. Battel* (a), a recent case, where they said the Court had granted relief against overseers' accounts, upon a rule obtained upon affidavit that they contained a charge for an allowance paid to the overseer. And so, in *Rex v. Great Marlow* (b), the Court entertained jurisdiction upon affidavit respecting the appointment of overseers, though a similar objection to the present was taken.

LORD ELLENBOROUGH C. J. If there is likely to be a defect of justice the remedy must be by application to the legislature; for the Court cannot enlarge the limits of its jurisdiction in order to supply a remedy. The sessions have jurisdiction over these matters; if, on the removal of the record by certiorari, it had appeared to be erroneous, this Court would then have acted upon it.

LE BLANC J. In cases upon orders of removal this Court does not hear affidavits of what passed at the sessions, but we act upon the case sent to us.

BAYLEY J. The object of the affidavits in *Rex v. Great Marlow* was to shew that the magistrates who made the appointment acted without jurisdiction.

*Per Curiam,*

Rule discharged.

*Nolan and Cowley* were against the rule.

(a) See note at the end of this case.

(b) 2 East, 244.

The following is presumed to be the case alluded to in argument, under the title of *Rex v. Battel*. The rule for the certiorari was obtained upon an affidavit as stated, but the case, as it appears, was decided upon objections apparent on the face of the order. The case was decided in *Hilary* term 1813.

### The KING against GLYDE.

UPON a rule to shew cause why an order of sessions confirming the accounts of *John Hilder* and Others, late churchwardens and overseers of the poor of the parish of *Salehurst* in the county of *Sussex*, should not be quashed, the order in question appeared to be as follows: Upon the appeal of *John Glyde* against the accounts of *John Hilder* and *James Hilder* late churchwardens, and *Thomas Martin*, *William Collins*, *Charles Woods* senior, and *Charles Woods* junior, late overseers of the poor of the parish of *Salehurst* in the county of *Sussex*, from *Easter* 1811 to *Easter* 1812, and allowed by two justices of the said county, whereby he the said *John Glyde* objected to the sum of 12*l.* 10*s.* in the said accounts paid to *Charles Woods* in his quarterly accounts as a salary, from *Easter* 1811 to the 23d of *June* 1811, and also to the like sum of 12*l.* 10*s.* as a salary also paid him from the said 23d of *June* to the 29th of *September*, and also further as to the like sum of 12*l.* 10*s.* paid also to *Charles Woods*, as a salary from the 29th of *September* to the 23d of *December*, and also to the further sum of 12*l.* 10*s.* as paid to the said *Charles Woods*, as a salary from the 23d of *December* to the 30th of *March* last, and also to the allowance of 40*l.* as paid to the said *Charles Woods*, for four quarters allowance for keeping the poor over and above the sum agreed on for that purpose; and upon hearing counsel on the part of the Appellant and also the Respondents, it is ordered by this Court that the said accounts be confirmed, and by this Court they are confirmed accordingly.

*Courtoispe* and *Bowen* in support of the order of sessions, admitted that if it appeared of the face of the order, that the sessions had confirmed the accounts in respect of a salary paid to the overseer, the order could not be supported; but they contended that so much of the order as mentioned the payments in respect of such salary, was merely a recital of the objections alleged against the accounts on the appeal, and not a part of the finding of the sessions, upon which the judgment was pronounced; and this Court would not intend that any evidence was given to the sessions to shew that the objections were founded in fact, or if there was, that it did not fully explain the items objected to.

The Court however intimated an opinion that they must understand the confirmation to extend to the items objected to, otherwise the order should have negatived there being any such items; instead of which it recited them as a part of the accounts, and then confirmed

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GLYDE.

Saturday,  
Feb. 6th.

Overseers cannot charge in their accounts for money paid as a salary to one of the overseers; and where the order of sessions confirming the accounts was in this form, "Upon the appeal of *G.* against the accounts of *H.* and *W.*, overseers, whereby he the said *G.* objected to the sum of 12*l.* 10*s.* in the said accounts paid to *W.* as a salary, it is ordered that the said accounts be confirmed;" this was considered as an order confirming the accounts in respect of the charge for the salary, and therefore the Court quashed the order; but sent the case back to be reheard as to the nature of the payment.

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the said accounts, i. e. the accounts containing the items objected to; but they said that if it could be shewn that such items were sustainable upon any ground whatsoever, they would presume that the sessions confirmed the accounts on that ground.

No ground however was suggested or case cited to that effect; but it was stated that these sums were in reality paid to the overseer in respect to the maintenance of the poor, and not as a salary.

Lord ELLENBOROUGH C. J. This rule may be enlarged, subject to a case to be stated as to what the grounds for the allowance were, that we may ascertain that the salary was not meant as a pension to the overseer, which the law will not allow. We have no doubt on the face of the order that he has no title to a salary for any meritorious services, or for any services at all; but we would wish to relieve the parties if it has been paid in reality for the maintenance and keeping of the poor. Perhaps the best way will be to quash the order, and remit the case to the Sessions to re-hear the appeal.

The other Judges concurred.

Order of Sessions quashed.

*Doyly and Roe* were to have opposed the order of Sessions.

Saturday,  
Jan. 29th.

### The KING against C. LAUGHTON.

Where the guardian and visitor of a parish, which had adopted the provisions of stat. 22 G. 3. c. 83., upon application to them for relief by a pauper for herself and children, directed them to be received into the poor house: held that one justice had not any jurisdiction upon complaint to him by the pauper to order relief out of the poor house; and therefore where defendant was convicted in a penalty for disobeying such order, which conviction was confirmed at the sessions, this Court quashed the order of sessions.

BY order of one justice, reciting that *Mary Lewis*, with her two infant children, were poor inhabitants of and residing in the parish of *West Walton*, in *Norfolk*, and that she was the wife of *Thomas Lewis*, then absent from her, and serving as a marine; and farther, that the said parish was incorporated according to the statute, &c., and that the said *Mary* applied to the defendant, the guardian of the poor of the said parish, for relief for herself and her children, and that the defendant refused her proper relief; that she afterwards applied to *Michael Wilcock*, the visitor of the poor of the said parish, who also refused proper relief; that thereupon the defendant was summoned to

appear

appear before the justice; that he appeared, and alleged that he had paid the said *Mary*, for the relief of herself and her children, 4s. a-week, but that he had discontinued such payment; and that the said *Mary*, being sworn, alleged that she had been refused proper relief, as set forth in the complaint, and that the said sum of 4s. a-week was not sufficient for the proper and necessary relief of herself and her two children: and no evidence or circumstance being adduced by the defendant to satisfy the said justice that the said sum of 4s. a-week was such relief as in justice and charity ought to be paid to the said *Mary* on behalf of herself and children, it was ordered that the defendant, the said guardian of the poor of the said parish, should pay, immediately after the service of this order, the sum of 4s. to the said *M. Lewis*, for the proper relief of herself and her two children.

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The KING  
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The defendant was afterwards convicted by two justices at a special sessions, and fined 30s., for disobeying this order, under stat. 33 G. 3. c. 55. Upon appeal to the general quarter sessions, the conviction was confirmed, subject to the opinion of this Court upon the following case:

The parish of *West Walton* is incorporated under stat. 22 G. 3. c. 83. for the maintenance of its poor; in which parish a poor-house is erected and fitted up for the reception of the poor. On application for relief by the said *M. Lewis* for herself and her two children, the guardian and the visitor appointed under the said act severally directed them to be received into the poor-house; whereupon the justice made the above order, directing a pecuniary relief out of the poor-house. On the appeal, all objections to form on both sides,



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sides, and all other objections except the one hereafter stated, being waived, the question stated for the opinion of the Court is, whether the magistrate had power and authority, under the stat. 22 G. 3. c. 83., to make the said order for the pecuniary relief of the paupers out of the poor-house.

*The Attorney-General, Holroyd, and Bevil*, in support of the order of sessions, contended in the affirmative, and referred to the 7th section of the act, which they said placed the guardian precisely in the same situation with overseers as to their powers and authorities, except with regard to making and collecting rates, and also as to their *liability to penalties* for neglect of duty. And as to the making and collecting the rate, the only difference is, that by the 8th section the churchwardens or overseers are to collect it and pay over to the guardian so much as he shall have occasion to employ for the purpose of discharging the necessary expences attending the poor-house, and the poor belonging to the parish. So that coupling these two sections together, it seems that the guardian is completely invested with the character of overseer. Supposing then this had been an order upon the overseer for the relief of the pauper and her family, she would not have forfeited the relief because she did not go into the poor-house, for she claimed relief as well for her children as herself, *Rex v. Haigh (a)*. Then the 35th section of the statute has expressly provided for this case, for it enables any justice on complaint by any poor person that the guardian hath refused proper

(a) 3 T. R. 637.

relief,

relief, after inquiring into the condition of such person, either to order weekly or other relief, or direct the guardian to send her to the poor-house, in case she shall be a fit object to be kept there." And here the justice, upon inquiry, has thought her not a fit object for the poor-house, and has therefore adopted the other alternative of ordering her relief. It is true that the 36th section enacts "that the justice shall not summon the guardian unless application shall have been first made to the visitor (it being part of his duty to adjust matters of that sort), who shall order relief if he thinks it necessary, either within or out of the poor-house, as he shall judge right;" and if it had stopped there, perhaps it might have been said that the visitor was the person to adjust the mode of relief; but it goes on, "if sufficient relief shall not be given; the poor person complaining shall be redressed by the justice in the manner before directed;" therefore it leaves the jurisdiction of the justice as before. And probably the justice thought that the directing the pauper and her children to be received into the poor-house was not a sufficient relief, and, according to the very words of the act, he is to judge of the sufficiency; and if so, he might adopt the other alternative.

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*Nolan*, contra, was stopped by the Court.

LORD ELLENBOROUGH C.J. The justice does not affect to determine upon the ground of its being a qualified refusal of relief. If proper relief has not been refused, the justice has not any jurisdiction. The visitor, to whom it is referred by law, as a part  
of

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of his duty, to say whether the relief shall be given in or out of the poor-house, has decided that question, and has determined it to be proper relief. If it depended on the choice of the pauper, the poor-house would be useless. The visitor having adjusted it, the matter was at an end, and not within the cognizance of the magistrate; and therefore the infliction of this penalty was not warranted.

LE BLANC J. The 7th section of the statute, which has been relied on in argument as putting the guardian on the footing of an overseer, must be taken with reference to the general policy of the act in which it is contained; and when the 36th section of the same act directs that application shall be made both to the guardian and visitor, before any application is made to a justice, and when it adds that it is the duty of the visitor to adjust matters of that sort, that is, whether it is most proper to relieve in or out of the poor-house, the liability of the guardian as overseer, imposed by the 7th section, must be controuled by the subsequent clause. The visitor must always determine whether the party is to be relieved in or out of the poor-house; otherwise the whole policy of the act would be avoided.

BAYLEY J. The 36th section puts an end to the question.

DAMPIER J. The 36th section having declared that the visitor is the person to adjust whether it be proper to relieve the party in or out of the poor-house, and the visitor having exercised his judgment, it seems to me that the justice had not any jurisdiction.

Order of Sessions quashed.

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**The KING against The Inhabitants of BARTON-  
UPON-IRWELL.**

*Saturday,  
Jan. 29th.*

**T**HE Court of Quarter Sessions for the county palatine of *Lancaster*, upon appeal, confirmed an order of two justices for the removal of *Joseph Edwards* and his children from the township of *Pendleton* to the parish of *Barton-upon-Irwell*, subject to the opinion of this Court on the following case:

The pauper *J. Edwards*, having gained a settlement by hiring and service in *Barton-upon-Irwell*, and being unmarried, was hired for a year as a servant to one *Watkins*, of *Great Lever*, whom he served for about 19 months there. After having been in that service about two months, being then married, he was taken before a magistrate on the complaint of his master, and committed to the house of correction for one month. When he had been in custody nine days, at the instance of his master he obtained a discharge from his imprisonment, returned immediately to *Great Lever*, and served him as before. On such return no mention was made of the terms on which he was to serve. He received no wages for the time he was in custody. The case then set forth the warrant of commitment, by which it appeared that the pauper had been charged upon the oath of *Watkins* (his master) with divers misdemeanors, and not acting in his service as a servant ought to do, and particularly in

Where a servant under a yearly hiring served two months, and was then committed and imprisoned under stat. 20 G. 2. c. 19. for misbehaviour to his master, and at the instance of his master, and after nine days imprisonment, was upon the application of his master discharged, and returned to him, and served him as before, and no mention was made of the terms on which he was to serve, and he served in the whole from the time of the hiring for about 19 months: held that the commitment and imprisonment were not a dissolution of the contract, or such an interruption of the service as to prevent a settlement, and therefore he gained a settlement by such master, and re-

hiring and service, although he was married when he returned to his master, and received no wages for the time he was in custody.

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using a horse of his master's in a cruel and inhuman manner, and also with disobeying and neglecting the orders of his master, contrary to the statute: that the justice had convicted him of the offence so charged against him, and had sentenced him to be imprisoned in the house of correction, and there kept to hard labour for one month.

*Paley*, in support of the order of sessions, contended that the commitment of the pauper operated as a dissolution of the contract with *Watkins*, and that as the pauper was married at the time of the commencement of the second service, that service could not be referred to any new contract capable of conferring a settlement. The rule by which to try whether this be a dispensation or dissolution of the contract is this, whether the master could have compelled the service of the pauper, or maintained any action against him for not serving him. Now it seems clear that he could not during the imprisonment, because that was the master's own act. If that be so, then there was a period of the contract during which the relation of master and servant no longer continued, or, in other words, there was a dissolution of the contract. And so it was considered in *Rex v. North Cray (a)*, where the servant was committed before the end of his year for not giving security respecting a bastard child, and the master was overseer, and had been active in his commitment, and afterwards deducted out of his wages on account of his absence, and the Court held it to be a dissolution. That case differs only from the

(a) *Cald. 495. S. C. 2 Bott. 322. 5th edit.*

present in this particular, that there the servant never returned, his year having expired; but a return to the service, though it may serve to explain the nature of the absence where it is equivocal, has never been held to convert a dissolution into a dispensation of the service. Here the master could not have compelled a return, there being a complete dissolution of the contract by the commitment; so that the return cannot vary the question. Besides, admitting that it could, and that it might raise an inference that the master had no objection to consider the period of his absence as a period of service, such an inference is completely rebutted by his deducting out of the wages for the period of absence. And it should seem, from the case of *Pawlet v. Burnham* (a), that a clear discontinuance of the service is sufficient to prevent a settlement, although there be not a dissolution of the contract.

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*Scarlett*, contra, referred to stat. 20 Geo. 2. c. 19. s. 2. which empowers magistrates to punish servants for misbehaviour either by commitment to the house of correction, or by abating some part of their wages, or by discharging them from their service. Here he was stopped by the Court.

Lord ELLENBOROUGH C. J. It would be clearly against the policy of the law if the servant by his own act of delinquency should have the power of dissolving the contract. The justices have that power, but they have not exercised it. The imprisonment of the ser-

(a) 2 *Bott.* 300. 5th edit.

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tants of  
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vant was so far from being a cessation of the service, that perhaps his labour might have been required of him by the master even while he was in prison. Then what farther circumstances appear upon this case? It is stated that the master deducted the wages for the period during which the pauper was absent. But after that period he returns into the service, (then indeed he was married, but he goes on under the old contract,) and nothing passes between the master and the servant with respect to any alteration, or any new contract, during the remainder of the 19 months. The master indeed had an election to avoid the contract, but he made his election to continue the pauper in his service, which it was in his power to do. In *Rex v. North Cray* there was an incomplete service.

LE BLANC J. The pauper being single when he was hired was capable of gaining a settlement, and his marriage during the year will not prevent it. It appears then that in consequence of his misusing a horse, a complaint was made against him by his master, and he was committed; but at the end of nine days his master applies to have him released, and takes him back again without any fresh agreement; and he goes on upon the footing of the original hiring until the end of 19 months, but he receives no wages for the time he was in custody. On this statement I think there was not any dissolution of the contract; the master might have discharged him, but he did not; he must then have returned on the footing of the old hiring. It is said indeed that there was an interruption of the service, but during the whole time he was subject to his master. It was under the authority of the contract

that his master acted when he punished him for misconduct; therefore it was not a dissolution. The master might perhaps have elected to dissolve it, but he has not done so. Neither do I think this was an interruption of the service to prevent a settlement.

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**BAYLEY J.** The relation of master and servant continued notwithstanding the commitment of the servant procured by the master. The commitment did not set free the servant from his contract to go wherever he pleased after the imprisonment ceased. That would be allowing him to avail himself of his own wrongful act. Then as to the service during the nine days. Perhaps the servant could not strictly be said to be actually serving while in prison, but there was a service for more than a year under a hiring for a year.

**DAMPIER J.** It seems to me that the master had no intention of dissolving the contract, for instead of that, he hastens back the return of the servant by begging off his punishment for the whole of the period except nine days.

Orders quashed.



1814.

Tuesday,  
Feb. 1st.EMANUEL *against* MARTIN.

A writ of error  
may operate as  
a stay of pro-  
ceedings,  
though sued out  
before inter-  
locutory judg-  
ment.

**A**NDREWS shewed cause against a rule for setting aside an execution for irregularity, and having the money restored which had been levied under it, on the ground that the execution issued after writ of error. He contended that the writ of error did not operate as a stay of proceedings in this case, having been sued out before interlocutory judgment; and he cited *Hill v. Tebb* (a), where he said the Court seemed to agree that in general a writ of error returnable before the signing of final judgment would be inoperative.

LE BLANC J. (the only Judge in court). It has been determined that a party may sue out a writ of error before final judgment; and I do not see why he may not before interlocutory judgment. There seems to be no reason for fixing on interlocutory judgment as the point. And he referred to *Somerville v. White*. (b)

Rule absolute.

*Comyns* in support of the rule.

(a) 1 *New Rep.* 298.

(b) 5 *East*, 145.

1814.

CROSBY and Another *against* OLORENSHAW.*Thursday,*  
*Feb. 3d.*

**ASSUMPSIT:** the defendant, after notice of trial for the last sittings in *Trinity* term, obtained leave to withdraw his plea of the general issue, and pay 67*l.* 10*s.* into court, pleading the same plea again, which he accordingly did. Afterwards the plaintiff countermanded his notice of trial; and in *Michaelmas* term the defendant obtained judgment as in case of a nonsuit. The Master, on the taxation of costs, allowed the plaintiff his costs to the time of paying the money into court, and the defendant his subsequent costs. A rule was obtained on behalf of the defendant for the Master to review his taxation.

The plaintiff is not entitled to costs to the time of defendant's paying money into court after the defendant has obtained judgment as in case of a nonsuit.

*Paley* shewed cause, and contended that the plaintiff, notwithstanding the judgment as in case of a nonsuit against him, was entitled to his costs up to the time of paying the money into court. He admitted, on the authority of *Stodhart v. Johnson* (a), *Stevenson v. Yorke* (b), and *Kabell v. Hudson* (c), that if the plaintiff had proceeded to trial and failed, it would have been otherwise; but the distinction is expressly stated in the two latter cases by *Buller J.* to this effect, that the plaintiff is entitled to his costs up to the time of paying money into court, if the application be made before trial. Here the application has been made before trial, and the plaintiff has not taken any step since the payment of the money into court. And therefore

(a) 3 T. R. 657.

(b) 4 T. R. 10.

(c) *Ibid.*

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CROBY  
against  
OLORNSHAW.

this case seems to fall within the reason of *Seamour v. Bridge (a)*; for there, though the defendant had not obtained judgment as in case of a nonsuit, which is the only difference between the two cases, he was in a condition to have obtained it; and the obtaining it will not vary the case, because that is the act of the defendant; and it is immaterial what steps the defendant may have taken, provided the plaintiff has not proceeded.

*N. Clarke*, in support of the rule, said the only question was, whether judgment as in case of a nonsuit was not of like force in this respect as a judgment upon nonsuit. And he referred to stat. 14 Geo. 2. c. 17. ss. 2, 3.

LORD ELLENBOROUGH C. J. I am inclined to think that a judgment as in case of a nonsuit is the same in all its consequences as if the party had proceeded to trial, and the defendant had obtained judgment upon nonsuit or verdict.

BAYLEY J. If the plaintiffs had applied for their costs before the rule for judgment as in case of a nonsuit was made absolute, they would have had them as of course.

*Per Curiam, (b)*

Rule absolute. (c)

(a) 8 T. R. 408.

(b) *Dampier J.* was absent.

(c) See *Buriall v. Horner*, 7 T. R. 372. *Lark v. Wright*, 8 T. R. 484 and *Hullock on Costs*, 349.

1814.

The KING *against* The Inhabitants of the  
Township of NETHERTHONG. *Saturday,  
Feb. 5th.*

UPON appeal to the quarter sessions for the West Riding of Yorkshire, against an order of removal from the township of *Netherthong* to the township of *Honley*, the respondents called a person, who was a rated inhabitant, and overseer of the poor of the township of *Netherthong*, who produced a certificate, dated in the year 1756, from *Honley* to *Netherthong*, acknowledging the pauper's grandfather and father to belong to *Honley*. The appellant's counsel objected that before such certificate could be received and read in evidence, some account must be given of it, and whence it came, which he contended the witness was not competent to give, on account of his being a rated inhabitant of *Netherthong*; and the Court being of that opinion, refused to permit the witness to give evidence, and discharged the order, subject to the opinion of this Court, whether such evidence ought to have been received.

A parish certificate of more than 30 years date, acknowledging the pauper's grandfather and father to belong to the appellant parish, produced by a rated inhabitant who was overseer of the respondent parish, was held to be evidence, though it was objected that some account should be given of it, and that the witness was not competent to give that account; and it seems that if necessary he might be examined as to the custody.

When this case was called on, *Stavely*, in support of the order of sessions, admitted that after the decision of *Rex v. Ryton (a)*, he could not sustain the ruling of the sessions; but he prayed that the case might be remitted to be heard on the merits.

LORD ELLENBOROUGH C. J. I remember upon the trial of an action for a false return to a mandamus, a

(a) 5 T. R. 259.

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The KING  
against  
The Inhabi-  
tants of  
NETHER-  
THONG.

corporator was called to produce some of the corporation muniments, and objection taken to his admissibility. But Lord *Kenyon* said that he should hold him capable, as a depository of the muniments, of being brought forward for the purpose of producing them, and that if the party objecting wished to inquire as to the custody he might, and that he would receive the evidence. If the parties choose to stand on such a point as this, it may be as well that they should abide by it.

*Per Curiam,*

Order of Sessions quashed.

*Scarlett*, who was against the order, mentioned the stat. 3 G. 2. c. 29. s. 8., which directs that a certificate, after it has been allowed, and the oath of its execution certified by the justices, shall be evidence without further proof.

*Saturday,*  
*Feb. 5th.*

The KING against The Inhabitants of  
QUAINTON.

An indenture binding out an apprentice with the consent of the trustees of certain funds bequeathed for the binding out poor apprentices, which was executed by the apprentice and the master, and recited the trustees to be

THE Court of quarter sessions for the county of *Buckingham*, upon appeal against an order for the removal of *Henry Harvey* from the parish of *Quainton*, in that county, to the parish of *Bicester-Market-End*, in the county of *Oxford*, quashed the order, subject to the opinion of this Court on a case; which stated in substance that by the will of the late Lady Viscountess *Say and Sele* 200*l.* were given to four trustees in trust,

parties, and in which the consideration paid by the trustees to the master was stated to be 20*l.*, was held to confer a settlement, though it was not executed by the trustees, and though the master actually received only 16*l.* 15*s.* 6*d.*, the residue being retained by the agent of the trustees for costs and expences of the binding.

with

with the interest thereof, to put out yearly six poor boys of the parish of *Grendon*, and six others of the parish of *Quainton*, apprentices, with power to the trustees, when reduced to two, to name two others. Conformably to this power, upon the death of two of the trustees, two others were named by the survivors, under the authority of the Court of Chancery, and the money, together with other personal property of the testatrix, was, under the same authority, directed to be vested in their names in government securities, upon the trusts above mentioned, with power to them to advance upon the putting out of each boy a sum not exceeding 20*l*. The pauper, on the 23d of *November* 1811, being then a poor boy, aged 13, of the parish of *Quainton*, was, with the consent and approbation of the then surviving trustees, bound apprentice to *J. Adams* of *Bicester* for seven years, for the consideration of 20*l*., stated in the indenture to be paid to *Adams* by the said trustees, who were also recited to be parties to the said indenture; but it was only executed by the pauper and *Adams*. This indenture was unstamped, and it appeared that *Adams* had actually received only 16*l*. 15*s*. 6*d*., the residue of the 20*l*. being retained by the agent of the trustees for the costs and expences of the binding. The pauper served under the indenture at *Bicester* more than 40 days. The question for the opinion of the Court was, whether the indenture was void on account of the trustees not having joined in the execution; or on account of the consideration-money being untruly stated therein; on which latter ground the justices at sessions decided in the affirmative.

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against  
The Inhabitants of  
*QUINTON*,

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The King  
against  
The Inhabitants of  
QUANTON.

*Best*, in support of the order of sessions, relied upon stat. 8 Ann. c. 9. s. 35., which directs the money received or paid or agreed for with every apprentice to be truly inserted in the indenture; and urged that the true consideration was not the gross sum agreed to be given by the trustees, but that which they agreed to give, and which the master received, after payment of the costs and expences of the binding. And upon the other point he contended that the trustees not having joined in executing the indenture, this could not be said to be placing out the apprentice by or at the sole charge of a public charity, so as to fall within the exemption from the stamp duty imposed by stat. 48 G. 3. c. 149. (a). And he compared it to the case of a parish indenture, to which the parish officers must be parties.

But Lord ELLENBOROUGH C. J. said, upon the latter point, it appeared that the money was paid out of the funds of the public charity, and that it was paid by the trustees in the execution of their trust; and that they acted very wisely not to involve themselves by becoming parties to the covenant. And as to the other point, that the consideration was fully stated. Even if a stamp had been necessary, the consideration would have been sufficiently stated, for it is stated against the party's interest. (b)

*Per Curiam*,

Order of Sessions quashed.

*Gurney and King* were against the order of sessions.

(a) Sched. part 1. Apprenticeship and Clerkship. Exemptions.]

(b) See *Rex v. Keynham*, 5 East, 309.

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ALLEN *against* SNOW.Monday,  
Feb. 7th.

THE plaintiff obtained judgment against the defendant, and afterwards proceeded by action against his bail, and having recovered, took them in execution; but one of them becoming bankrupt and obtaining his certificate, was discharged out of custody, and the other was also discharged on payment of 5s. in the pound, but upon an express understanding that the plaintiff was at liberty to proceed against the defendant for the residue of the debt and costs. And now, the defendant having been taken upon a *capias ad satisfaciendum*, *Walton* applied to the Court for his discharge, and that the plaintiff should pay the costs of this application; and he referred to *Higgen's* case (a) for the rule that if the plaintiff take the bail, although he had not full satisfaction, he shall never afterwards meddle with the principal; and the same was recognized in 1 *Roll. Abr. Execution* (G). And the reason seems to be, that otherwise the principal would be liable to make satisfaction twice, for he is liable to his bail; and it is not a very common practice to take the bail.

If plaintiff sue the bail by action, and take them in execution, he cannot afterwards take the principal, though one of the bail become bankrupt and be discharged, and the other also be discharged on payment of 5s. in the pound, and upon an understanding that the plaintiff was at liberty to proceed against the principal.

*Gaselee* shewed cause, and cited *Felgate v. Mole* (b) to shew that although execution be taken against the bail, and they pay part, yet the plaintiff may afterwards take execution against the principal for the residue, the bail being previously at large; and this was said to be the constant practice of the Court, and that in *Higgen's*

(a) *Cro. Jac.* 320. *S. C.* 2 *Bulst.* 68. 10 *Fin. Abr.* 578. *Execution*. (G a.) pl. 1.

(b) 1 *Sid.* 107.



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case it must be intended that the bail were in custody. It is true that the reporter has subjoined a quære; but in *Freeman v. Executor of Freeman* (a) it was expressly adjudged, that without satisfaction by the execution against the bail, the plaintiff might always charge the principal. And in *Astree v. Ballard* (b) the scire facies against the bail was holden well, though the plaintiff had taken the principal: and *Orlibary v. Norris* was cited, in which it was resolved, where the bail was taken first in execution and afterwards the principal, that they should both be detained until satisfaction; which goes much beyond the present case. But supposing the rule to be as in *Higgen's* case, the present is taken out of that rule by the express understanding at the time, that the plaintiff should not be prejudiced in his remedy against the principal.

LORD ELLENBOROUGH C. J. I think there has been here body for body. The plaintiff cannot have both; he cannot resort from one to the other.

LE BLANC J. The plaintiff elected to take the bail in execution, which was satisfaction.

BAYLEY J. In *Freeman v. Executor of Freeman* it was not pleaded that the party had taken execution against the bail, and therefore not shewn that he was satisfied. And in *Astree v. Ballard* there were two principals; one only was taken, and as to the other non est inventus; as to him therefore there was a forfeiture of the recognizance.

*Per Curiam*, Rule absolute, but without costs.

(a) *Cro. Jac.* 549.(b) 1 *Ventr.* 315.

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The KING *against* PASCOE and Another.*Monday,*  
*Feb. 7th.*

UPON a rule nisi for a mandamus to the defendants, two justices of the peace of the county of Cornwall, commanding them to grant a warrant of distress for levying 39*l.* 13*s.* 11½*d.* upon the goods of *D. Keskeys* and *R. Ruberry*, late overseers of the poor of *Ludyvan* in the said county, it appeared from the affidavit in support of the rule, that the accounts of the said overseers for the year ending *Easter* 1813, were submitted to the defendants at a special sessions for allowance, when the defendants disallowed several items, upon objection taken, amounting to 43*l.* 1*s.* 11½*d.*, and made an order on the said overseers to pay over the same to the present overseers. The late overseers appealed against the order to the next quarter sessions, which appeal was dismissed for want of a sufficient recognizance; but notwithstanding such dismissal they refused to pay over the balance; whereupon application was made to the defendants for a warrant of distress, to levy the same on their goods. Upon this a summons issued, and the late overseers attended the defendants, together with one of the two present churchwardens, and two of the three present overseers, when it appeared that they had paid over 3*l.* 8*s.*, but refused to pay the remainder. Whereupon the defendants were required by one of the present overseers to issue their warrant of distress, but as the other two parish officers refused to concur with him in the application, the defendants thought they had no jurisdiction for want of the concurrence of the major part of the

If the overseers after allowance of their accounts by two justices at special sessions, and an order by the justices to pay over the balance to their successors, which order is confirmed on appeal, refuse to pay such balance, the two justices may issue their warrant to levy the same under 50 G. 3. c. 49. upon the application of one of the succeeding overseers, although the rest of the churchwardens and overseers refuse to concur in such application; therefore where the justices refused to issue such warrant upon such application, the Court granted a mandamus.

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The King  
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the present churchwardens and overseers, and thereupon refused to issue their warrant. It was stated that the overseer who made the request was not able to procure any other of his colleagues to concur with him.

*Bayly* shewed cause, and contended upon the construction of stat. 50 G. 3. c. 49. that the warrant of the justices could only issue upon the application of the major part at the least of the subsequent churchwardens and overseers. The statute enacts that "in case the late churchwardens and overseers, or any of them, shall refuse, &c. it shall and may be lawful for the *subsequent churchwardens and overseers*, by warrant from any two or more justices, to levy all such sums," &c. That imports that the collective body of the parish officers must act in this instance, for otherwise the statute would have added, "or any of them," as it has done in speaking of the late overseers. There is not any ground in this case to impute fraud to the overseers who refuse to concur.

*Gaselee*, contra, said that the statute did not expressly require that any application at all for the warrant should be made to the justices by the churchwardens and overseers, but only that *it should be lawful for them by warrant from the justices*; and the object of the act is against the construction contended for on the other side; because the 43 *Eliz. c. 2. ss. 2, 4.* and 17 *Geo. 2. c. 38. s. 3.* are imperative upon the overseers to pay over the balance to their successors, and the present act was only meant to ascertain the balance; and therefore to hold that it alters the obligation of the overseers to pay the balance, and leaves it in the option of their successors whether they shall do so

or not, would be against the object of the act. And for a like reason it was held in *Rex v. Sir J. Carter* (a) that an appeal to the sessions against overseers' accounts did not prevent the magistrates out of sessions from enforcing the payment of the balance. And according to *Rex v. Justices of Somerset* (b) the Court will not suffer the former and succeeding overseers by colluding together to dispense with the statute. Great inconvenience may ensue if it should be holden necessary for all the parish officers to concur in this instance, for unless this mode of compelling payment can be enforced, it may be doubtful if there be any other.

The Court heard a part of the above argument on a former day, after Lord *Ellenborough* C. J. had left the Court, and doubting at that time whether this statuteable remedy could be enforced except at the instance of those who they said seemed appointed by the statute for enforcing it, adjourned the case. But on this day after further argument, Lord *Ellenborough*, C. J. being present, the Court said, that without imputing fraud in this case they should be restraining the meaning of the statute too much if they did not put it into motion upon the application of any one of the overseers; that the mischief of a more strict construction would be great, for then the dissent of any one of the churchwardens and overseers would have the effect of suspending the statute.

*Per Curiam,*

Rule absolute.

(a) 4 T. R. 246.

(b) 2 Str. 992.

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against  
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*Monday,  
Feb. 7th.*

The KING, on the Relation of THOS. CRANE,  
against Sir W. W. WYNNE, Bart.

The Court will not stay proceedings in a quo warranto information until the prosecutor give security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator, and no fraud is suggested.

*PARK* and *Richardson* shewed cause against a rule for staying proceedings upon an information in nature of quo warranto, for exercising the office of mayor of *Chester*, until security given by the prosecutor for costs; which rule was obtained on the ground that the relator was in insolvent circumstances, having failed in business about two years ago, when all his stock was sold off, and he paid 8s. in the pound; and that he was now a journeyman book-binder. They contended that as it appeared by the affidavit that *Crane* was a freeman of the corporation, he was as such interested in making his complaint, and was not like a mere stranger: the statute (a) had assigned him to be the relator. And this is an application of the first impression.

*Abbott* and *D. F. Jones* in support of the rule denied that it was entirely without precedent, and cited *R. v. Latham*, *B. R. E. T. 1764* (b), where a similar relief had

(a) 9 *Ann. c. 20*.

(b) *R. v. Latham*, (we were favoured with this by Mr. *Dealtry*).

*Easter 1764*.—An information in nature of a quo warranto was exhibited against *John Latham* for usurping corporate franchises in the borough of *Wigan* in the county of *Lancaster*, upon the relation of one *John Grace* the younger.

*Trinity 1764*.—The defendant pleaded a special plea, to which the prosecutor replied, and the defendant rejoined.

*Trin. Vac. 1764*.—Before the prosecutor surrejoined, the defendant obtained a summons from one of the Judges for the prosecutor to shew cause why all proceedings should not be stayed until a better relator entered into recognizance. Upon which the prosecutor served notice upon the defendant, "that the Duke of *Portland* and 13 other persons,

" or

had been granted. And they said that the practice was, for the parties upon whose affidavits the rule for the information is obtained, afterwards to make such person as they think fit the relator. So that the relator is not the real prosecutor, nor does he in this instance state himself to be such, or appear upon the affidavits on which these proceedings originated, but he is the mere creature of the prosecutor, as the Court must intend. And his being a freeman will make no difference, for the statute admits any person to be relator, although the application for the information must be at the instance of parties interested.

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The KING,  
on Relation of  
CRANE,  
against  
Sir W. W.  
WYNNE.

Lord ELLENBOROUGH C. J. If it had been suggested on the affidavit, that at the time of the application for this information, *Crane* was a mere stranger, and that his name had since been inserted in the proceedings, as an instrument in the hands of others, without any concern himself, that might have made a difference, and furnished something like a strong case; but here it appears that he was a freeman, and if a stranger has a right to be the relator, a fortiori, he had; and we must assume in the absence of any statement to the contrary that he was concerned. If it had been shewn that he was a mere faggot, it might have made a case to call upon him for an answer, but here all that appears and is admitted is his poverty. The Court only say that

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"or one of them, would enter into the usual recognizance to prosecute the information in the place of *John Grace*, to whom the defendant had thought proper to object."

And accordingly *George Byng* of *Wrotham park* in the county of *Middlesex*, Esq. entered into such recognizance, and the information was amended by striking out the name of *John Grace* as the relator, and substituting the name of *Mr. Byng*.

Like proceedings took place on like informations against *Thomas Jennings* and *William Wesley*.

this

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The KING,  
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this application in the precise form in which it is now shaped cannot be sustained. They do not pronounce as to any other form of application.

*Per Curiam,*

Rule discharged.

Monday,  
Feb. 7th.

WATCHORN *against* COOK.

It is too late for the defendant in the term after judgment signed and execution levied, to apply to enter a suggestion on the court of conscience act to deprive the plaintiff of his costs, if he could have applied in the same term.

THE defendant suffered judgment by default, and a writ of inquiry was executed; and on the 2d of *November* last final judgment was signed and the costs taxed. In the same month execution issued thereon, in discharge of which the defendants paid into the hands of the sheriff 20*l.* 9*s.* 6*d.*

*E. Lawes* moved, under these circumstances, for a rule nisi to refer it to the master to see what was due to the plaintiff at the commencement of this action, and, if a sum not exceeding 5*l.* should appear to have been due, to enter a suggestion on the roll under the court of conscience act for the hundred of *Blackheath* (a), to deprive the plaintiff of his costs, and that the residue in the hands of the sheriff might be returned, &c., upon an affidavit stating that the defendant was resident within the hundred, and that the damages awarded on the writ of inquiry amounted to no more than 3*l.* 6*s.* 4½*d.*, and that the defendant's attorney, on searching at the Master's office on the 31st of *January*, found that judgment had been entered up as above. The Court having expressed a doubt whether the application was not out of time, the judgment having

(a) 47 G. 3. sess. 1. c. 4. s. 14. Local and personal.

been signed last term, he referred to *Foot v. Coare* (a), and argued, as in that case, that such objection could not hold, where the ground of the application was that the judgment was void for the costs. But

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*The Court* distinguished that case, inasmuch as there the defendant had, before final judgment in the second action, tendered the debt and costs in the first, and given notice to the plaintiff not to enter up judgment for costs, and afterwards came to the Court as soon after execution issued as he could; and the whole was a vexatious proceeding. But here the judgment was regularly signed last term, and when the Court is required to do such an act as to set aside a judgment, the application ought to be made with all common speed for the sake of convenience.

*Per Curiam,*

Rule refused.

(a) 2 Bos. &amp; Pull. 588.

WARWICK and Another *against* COLLINS. (a)Tuesday,  
Feb. 8th.

DEBT on 2 & 3 *Edw. 6. c. 13.* for not setting out tithes of barley and oats in 1812 (b). Plea, nil debet. At the trial before *Wood B.* at the last assizes for *Cumber-*

The rule of law for determining what is barren ground within stat. 2 & 3 *Ed. 6. c. 13.* is whether

the land is of such a nature as to require an extraordinary expence in the manuring or tilling to bring it into a proper state of cultivation; and not whether it is or is not in its nature so fertile as after being ploughed and sown to produce of itself without manuring or tillage a crop worth more than the expence of ploughing, sowing, and reaping.

(a) Cause was shewn against the rule at *Serjeants' Inn* before this term.

(b) See more fully per Lord *Ellenborough C. J.* in delivering the judgment.

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*land*, the plaintiffs, after shewing their title as farmers, proved that the land on which the barley and oats grew was part of a new inclosure from the common allotted to the defendant. It was part of the forest, and had whins and brackens growing upon it, and a small portion of ling. Early in the summer of 1811 the defendant ploughed it, and limed it with about 35 *Carlisle* bushels (105 Winton) per acre, but this was said not to be more than was sometimes used in breaking up old meadowland into arable, and he harrowed it three times, and again in the following spring ploughed it twice and harrowed it six times, and sowed about seven acres with oats and half an acre barley. It was a middling crop the first year; and it was proved that in the then present year there was a much better crop from only one ploughing and without any manure, and also that it was land of a good quality. A witness who had an adjoining allotment of nearly the same quality, and pursued almost the same course of husbandry, but with somewhat a smaller quantity of lime at the same period, swore that the expences of clearing, ploughing and harrowing, including lime, amounted to 10*l.* 13*s.* 6*d.*, and the other expences of sowing, reaping, &c. made a total of 13*l.* per acre, and that he got 8*l.* per acre for the first crop, and for the second, which he had then sold, 11*l.* 12*s.* per acre. The produce of the first crop was between six and seven bushels for one, whereas the return on the ancient land is 14 or 15 for one. And several of the witnesses agreed, and none of them denied, that if the land in question had been broken up without liming or manuring, it would not have produced a crop worth seed and labour; and it was sworn that this experiment of taking a crop from the  
 first

first furrow had been made in several instances, and the result was so; and in one instance it was said the crop was good for nothing, and would not have fed a goose. But some of the witnesses said that this land would let for 40s. an acre, though one of them proved that he had let a similar allotment, after fencing it, for ten years at the rate of 2*l.* per annum an acre, but the tenant was to have the land the two first years rent-free, and that he thought that was a good price. All this appeared upon the plaintiffs' case, and the defendant called no witnesses, but relied on this evidence as shewing that the land in question would not, upon being broken up and sown, have produced a crop of itself without tillage; and therefore he contended that it was within the protection of the fifth section of the statute respecting barren land. The learned Judge, after reading the clause to the jury, stated to them that he believed there was not any land in the kingdom so barren in its nature as that, when it was ploughed up and sown, would not of itself, even without manure or tillage, produce some sort of crop and of some value, though perhaps extremely small, and therefore to say that land was liable to tithe which would of itself, without tillage, produce any sort of crop, however small, and though it would not feed a goose, to use an expression of one of the witnesses, would be to render the provision of the statute nugatory. That therefore could not be the proper line to draw. And he stated, as the result which he had drawn from the cases, that to render it tithable within the seven years it must, at its first conversion and improvement into arable land, be in its own nature so fertile as to produce of itself without tillage a crop which should yield a profit to the occupier *beyond the expence of ploughing, sowing, and reaping*: if it would do that it was liable to tithe for

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the first seven years, otherwise not. That the quality of the land at its first cultivation and improvement was that to which they were to point their attention, for if it was not then tithable it would not become so by any fertility it might subsequently acquire in the course of the seven years; if it once gained the exemption, it retained it during the seven years. That if the jury (laying out of their calculation the expence of inclosing and clearing it of brackens and whins) thought the land, after being cleared so as to be ploughed, was in its own nature so fertile that if it had been then ploughed and sown it would of itself, without liming, manuring, or tillage, have produced a crop worth more than the expence of ploughing, sowing, and reaping, then in his opinion it was not exempt, and their verdict should be for the plaintiffs; but if they thought it would not have produced such a crop without liming, manuring, or tillage, then it was exempt, and their verdict ought to be for the defendant. The jury found a verdict for the defendant.

A rule nisi was obtained in the last term for a new trial on the ground of a misdirection.

*Scarlett, Littledale, Brougham, and Tindal*, shewed cause, and first they referred to 2 & 3 Ed. 6. c. 13. ss. 5, 6., from the latter of which sections, they said, it was manifest that the meaning of "barren heath or waste ground" within the statute was not to be confined to land totally unproductive or incapable of producing any thing, because that section assumes that such barren, waste, or heath ground, may before that time have been charged with the payment of tithes. And therefore in *Pelles v. Saunderson (a)*, it was held that land might be

(a) *Dyer*, 170. b.

discharged

discharged as barren, although it had paid tithe of wool and lamb. And so Lord *Coke* says (a), that albeit it doth yield some fruit, yet if it be barren land quoad agriculturam, which this branch of the statute meant to advance, it is within the act, for albeit barren ground, as to tillage, doth pay tithe wool and lamb, yet is it within this act." This shews that there must be some other criterion, and not its unproductiveness alone, or incapacity to produce, by which to judge of its barrenness within the statute; and that criterion seems to be laid down in several cases. In *Witt v. Buck* (b) the whole Court agreed in this, that by the statute barren ground is such as will not bear corn of itself, without very great cost in the extraordinary manuring of it. And in *Freem.* (c) it was resolved that such is intended barren land, which before the ploughing produced no profit to the owner: making the ploughing, therefore, the criterion of whether barren or not. Again, in *Stockwell v. Terry* (d), Lord *Hardwicke* said that if land will not produce *unless dunged or chalked*, it has been considered as evidence of its being barren in its own nature, not proper for corn without additional improvement. Also, in *Hutchins. v. Maughan* (e), where, in order to obtain a crop of corn of *any considerable value*, it was necessary to pare, burn, and lime or manure, using more than the ordinary means of culture, the land was held entitled to exemption. And in *Jones v. Le David* (f), *Eyre C. B.* recognized Lord *Hardwicke's* doctrine in *Stockwell v. Terry*, and put the converse of his proposition in order

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(a) 2 *Ins.* 656.(b) 3 *Buls.* 166.(c) 1 *Freem.* 335. 6th Resolution. S. C. 2 *Gwill.* 560.(d) 1 *Ves.* 117.(e) 3 *Gwill.* 1197.(f) 4 *Gwill.* 1337.

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to try the case then before him; "if, said he, "land will bear a crop of corn *without expence in tillage*, it must be decisive that this land is not *suapte natura sterilis*." And as to the point determined in *Witt v. Buck* he observed, that if it could be supported at all, it must be on other reasons than those assigned in the book, and on the peculiar nature of the land in that case. The principle, however, of that decision, and of the decision in *Sherington v. Fleetwood* (a) is no more than this, that land which is not of its own nature barren, but by negligence or ill husbandry has become so, if by simply removing those impediments, as in the case of embanking or draining marsh or flooded lands, or grubbing up thorns and bushes, it is regained and sown with corn, it shall pay tithe presently; and the reason given in *Bulst.* is remarkable, for this land, said the Court, bears good corn, being regained, and that *without any marling*, or any great cost in manuring the same, which proves that it is not barren within the intention of the statute;" and in *Cro. Eliz.* the Court agreed that the statute intends such land as is merely barren and made good by foldage or other industrious means." Whether, then, upon these authorities the criterion of barren ground within the statute shall be held to be, the not producing a crop upon the mere breaking up by the plough, without any manuring, or without more than ordinary manuring, or without very great costs in the manuring, it is submitted that upon either of those rules this land comes within the exemption. But if there should be a doubt upon the choice of the rule, it is further submitted, that that

(a) *Cro. Eliz.* 475.

which is simple, and ready of application, and easily understood, and above all for the advancement of tillage, which this statute had in view, should be preferred. All these advantages may be predicated of the rule, if the rule be, whether, after the clearing and ploughing, without more, the land is worth the expence of cropping; but if what are the ordinary or extraordinary modes of culture are to form a part of the rule, it will be complex and for ever varying.

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*Park, Richardson, and Paley*, contra, insisted that what was evidence only had been left to the jury as a rule of law; that the rule of law with respect to the construction of what was barren ground within the statute, was not that such land is barren which, upon being ploughed and sown, is not so fertile as of itself, without liming, &c. to produce a crop worth more than the expence of ploughing, sowing, and reaping; yet that was the rule given to the jury. If land be in such a predicament it may be evidence of its being barren, and to that extent only Lord *Hardwicke* considered it in *Stockwell v. Terry*; but even as evidence it is not by any means decisive. This appears from 2 *Inst.* 656., where Lord *Coke*, in his comment upon the word barren, says, "But yet if the ground be *not apt for tillage*, yet if it be not *suaapte natura sterilis*, it is not within the act;" by which is meant, unless the land from its bad quality defies culture, not unless it makes a profitable return after ploughing and sowing, it is not within the act. And the same book goes on, "if by ill husbandry or unprofitable negligence any land become overrun with bushes, furze, whins, and briers, yet are not they or any of them said to be barren

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barren land;" which seems to meet precisely the present case. And *Witt v. Buck* agrees with 2 *Inst.*, and also with all the cases, except perhaps what fell from Lord Hardwicke in *Stockwell v. Terry*. In *Hutchins v. Maughan* the decree passed without any observations from the Court, but there was this strong fact, which is not stated in the report, but was afterwards noticed by Eyre C. B. in *Jones v. Le David (a)*, that from the exposed situation of the land no corn would grow without first incurring the expence of stone walls to protect it from the severity of the climate. So, in *Byron v. Lamb (b)*, the ground would not admit of the ordinary process of harrowing. And the consequence of adopting the rule contended for on the other side will be, that all uninclosed lands, when first brought into cultivation, will be entitled to this exemption.

The case was adjourned for consideration; and on this day,

LORD ELLENBOROUGH C. J. delivered the judgment of the Court. This was an action of debt on 2 & 3 *Ed. 6.* for not setting out tithes of barley and oats on 200 acres of land in the parish of *Wetherall*, the plaintiffs being farmers of the tithes. There was a count in debt for tithes received by the plaintiffs' permission; a quantum valebant and account stated. Plea, nil debet. The land on which the tithes grew was newly inclosed and cultivated. The question was whether it was exempted for seven years under the proviso in 2 & 3 *Ed. 6. c. 13. s. 5.* And the point for the decision of the Court is whether the jury in determin-

(a) 4 *Gwill.* 1338. (b) Cited by Eyre C. B. *ibid.* and 4 *Gwill.* 1594.

ing this case have not had their attention directed to too strict and limited a rule of law, as to the description of barren land within the meaning of the statute. The words of the statute must be considered, Lord *Coke's* comment upon it, and the decided cases. The words of the statute 2 & 3 *Ed. 6. c. 13. s. 5.* are, "That all such barren heath or waste ground, other than such as be discharged for the payment of tithes by act of parliament, which before this time have lain barren, and *paid no tithes by reason of the same barrenness*, and now be or hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and term of seven years next after such improvement fully ended and determined, pay tithe for the corn and hay so growing upon the same." The sixth section shews that land to be entitled to this exemption need not be quite unproductive, because it enacts the payment, during the seven years, of such tithes as had been before paid. On the other hand, the statute does not exempt meadow-land converted into arable, nor the converse, nor as I conceive pasture (unless it be barren, &c.) converted either into meadow or arable. To establish the exemption the land must have been "barren heath or waste ground," and this the party who claims the exemption must shew. Further all "barren heath or waste ground" is not exempted, but only "such as had paid no tithes by reason of its barrenness," and this also the party claiming the exemption must shew. The description of such "barren heath or waste land" may be illustrated by a description of its opposite "fertile land," but the question to which the attention of the jury is to be directed is, Is it "such barren heath or waste ground as had paid

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paid no tithes by reason of its barrenness." To decide for the exemption they must be satisfied that it is. All land upon which this question can arise must be land first (*i. e.* never before) cultivated for a crop of grain or hay. There is land which is neither fertile nor barren; such land is not intitled to exemption from its want of fertility, if it cannot be said to be barren. There is nothing in the words of the statute from whence it can be collected, that the legislature included all land within the exemption, which would not produce a profitable crop by those steps *alone* being taken, which give it the possibility of producing any crop, *viz.* turning up the soil and sowing it with corn. There are two causes of unproductiveness of land, one arising from the mere neglect of cultivation, the other because the land is in its nature unfit for and indisposed to receive and return the benefits of cultivation. The latter only is protected; all land which has not been already cultivated by the plough is, to use Lord Coke's words, (*a Inst.* 656.) *so far not apt for tillage*. Something must necessarily be done, some labour bestowed, some expence incurred, in all cases to conquer this inaptitude. Then comes the question on the limitation in the statute, whether "it has paid no tithes by reason of barrenness," (on which the comments made on the statute and the cases have principally turned,) in other words "whether it be *sua pte naturâ sterilis*;" and this all agree must be shewn to intitle it to exemption. It seems neither reasonable, nor analogous to the common course of husbandry, to confine *the inaptitude for tillage* to such causes only as hinder the mere use and passage of the plough over it, such as the incumbrance of wood, of water, or furze and whin; there is an ulterior inaptitude

tude to these in all cases of new land arising from the rankness and foulness of the soil, and, if I may use the expression, from its unsubdued condition. If the land only require the manure and cultivation ordinarily necessary to bring it into an apt state of tillage, it is not *suapte naturâ sterilis*. Sterility *ex vi termini* imports an ungrateful soil: a sort of natural and constitutional infecundity resisting the ordinary means properly applied to render it otherwise. That the mode to which the attention of the jury was directed for ascertaining the sterility of the soil will not stand as a criterion, is pretty clear from the consideration that it probably is a course which no prudent person ever did adopt in the cultivation of new land, nor is it likely to be adopted, except for the purpose of securing an exemption, if this doctrine should prevail. But if that *great charge and industry* which Lord Coke speaks of in the same page of his book (2 *Inst.* 656.) should be required, if that *very great cost* for the *extraordinary manuring of it* which the whole Court in *Buck v. Will* (a) adverted to as the criterion of barren land, be necessary, then the land is *suapte naturâ sterilis* within the statute, and intitled to the exemption of it. The expression in that case is very remarkable; "The whole Court agreed in this that by the statute barren ground is such ground as will not bear corn of itself without *very great cost* in the *extraordinary manuring of it*." All the cases have expressions of some sort or other from whence it appears, that though the very expression of *extraordinary manure* may not occur, the idea was in the contemplation of the Court. In *She-*

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(a) 3 *Bull.* 166.

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*rington v. Fleetwood, Cro. Eliz. 475.*, which was relied on by the defendant, Lord C. J. Popham's words are "and the statute does not intend that tithes shall not be paid within seven years after the manurance, &c., but of such land as was *merely barren* and made good by foldage or *other industrious means*." Folding was not then ordinary husbandry; at that time there was great difficulty in keeping sheep through the winter: *other industrious means* must be construed other means of improvement not in ordinary use, and not of the common process of husbandry; this also appears from the expression of *merely barren*, which means the same as *absolutely* or *positively barren*. In *Stockwell v. Terry (a)*, Lord Hardwicke is stated to refer to Lord Coke's rule in 2 *Inst.* 656. in these terms: "If land is in its own nature so barren as not to be fit for agriculture after it is improved, it shall not pay tithe; but if in its own nature it is fit for tillage, but by reason of wood or other accidental circumstance it was not turned into tillage before, upon the taking away of that accidental circumstance it shall pay tithes presently upon being turned into tillage; for the act does not consider the expence but that you may by possibility be paid, as by the timber, underwood, &c. But if afterwards this land will not produce without being dunged or chalked, the Court has considered this as *evidence* of its being barren in its own nature: not proper for corn without additional improvement. It is admitted that this land produced three crops of corn without anything but ploughing, but objected that chalking will be necessary, and so it may in the course of com-

(a) 1 *Wm.* 115.

mon husbandry. But the question is, what was necessary for the first crop? The way of arguing for the defendant would throw the expence on the first seven years, whereas the benefit is to continue for ever. There is an expence in gaining land from the sea, yet no seven years allowed, though overflown time out of mind, because the benefit is lasting; *but if an additional expence is necessary to make it produce the first crop, seven years shall be allowed.* It is admitted that this land is not barren, and there is much land which can neither be called fertile nor barren, that pays tithe." For this position, *that if an additional expence, &c., no prior dictum or decision in any law book is to be found, much less for the point now contended for, "that if any additional expence is necessary to make it produce a first crop, yielding a profit, seven years shall be allowed."* Upon this authority, however, it is in the first place to be observed, that Lord Hardwicke only states this as evidence, *i. e.* as a circumstance to prove its being barren, which is a very different thing from laying down a positive rule of law as resulting from the mere fact itself. The note in *Vesey* gives no particulars of the evidence relating to the culture and produce of the crops on this land; but it is not to be credited that within seven years it produced three crops of corn without any manure at all; and the fair result of the whole is, that the dunging and chalking mentioned by Lord Hardwicke must be intended of an extraordinary quantity, and that the three crops were produced by the ordinary means of a proportion of manure and labour. This is rendered more probable by a short note of the same case in *Bull. N. P. C.* 191., which is not cited as from *Vesey*, and is evidently

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dently taken from a different note. It is as follows: "Lord *Hardwicke* held such land only within the clause of the statute relating to barren land as, over and above the necessary expence of inclosing and clearing, required also expence in manuring, before they could be made proper for agriculture; and therefore decreed tithe on its being proved that the land bore better corn than the arable land in the parish without any extraordinary expence in manure, &c., and that it had paid tithe of milk, wool, &c. before." That the words *extraordinary* or *great* may be dropped out of notes, or might be supposed to be meant when not expressed, appear not only from the difference of the expression in these two notes of *Stockwell v. Terry*, but from the different reports of *Buck v. Witt* in 3 *Bulst.* 165., and 1 *Roll. Rep.* 354. That in *Bulstrode* is much the fuller and more particular account of the case, and its accuracy, when the doctrine is compared with that in 2 *Inst.*, cannot be doubted. In *Roll's Rep.* the expressions are, "the land is very good land, and bears good crops without *any charge* in the manurance." — "That such land shall be said to be barren, which of its own nature is barren, and is made arable *by labour*." — "Such land is not barren which can bear crops without cost." None of which phrases can be literally understood; for what land ever bore a crop without cost? especially too when they are compared with *Bulstrode's* note of the case. Upon the whole, it appears that neither the words of the statute nor the comment upon it, nor a view of the adjudged cases, will warrant such a rule of law as has been contended for in the present case. The proper inquiry seems to be, whether this land was of such a nature as to require  
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extraordinary expence either in manure or labour to bring it into a proper state of cultivation; and the attention of the jury not having been directed to that point, we think that the rule for a new trial must be

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HASSELL and CLARK, Survivors of SAVIGNAC and PATCH, deceased, *against* LONG and Another, Executors of S. LONG.

Tuesday,  
Feb. 8th.

**D**EBT by the plaintiffs as survivors on bond dated the 5th of *December* 1796 for 1200*l*. The defendants prayed oyer of the bond, which was given by S. Long as surety for one J. Edge to Hassel and Savignac by the name and description of churchwardens, and to Clark and Patch by the description of overseers of the poor of the parish of Carshalton in Surrey. They also prayed oyer of the condition, by which, after reciting that Edge had been for some time past and still was collector and receiver of the tax called the land tax, and all other taxes and duties imposed by virtue of several acts of parliament upon the inhabitants and parishioners of the said parish, by means whereof he the said Edge received and collected from the said inhabitants and parishioners divers large sums of money, it was conditioned that Edge should from time

A bond made by defendant's testator as surety for E., with a condition reciting that E. had been and still was collector of the land-tax, and all other taxes and duties imposed by several acts of parliament on the inhabitants of the parish of C., by means whereof he received from the inhabitants divers sums of money, and conditioned for the due payment by E., from time to time and at all times there-

after, to the receiver-general of taxes, &c. all and every sum which he (E.) should from time to time collect and receive from the inhabitants of the parish for or on account of any tax or taxes then imposed, or which should or might thereafter be imposed on them by any act of parliament, was held to be confined to the current year for which E. was, at the date of the bond, collector, although it did not appear on the condition that he was only appointed for a year; it being shewn by the defendant's plea that the said office of collector was an annual office, and held as such by E. at the date of the bond, although by the replication it appeared that E. held the office not only for that year, but from thence to the time of exhibiting plaintiff's bill.

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to time, and at all times thereafter, well and truly pay, or cause to be paid, unto the receiver or receivers general for the county of *Surrey* of the taxes and duties imposed by virtue of the said acts of parliament, or to such other person or persons as should be lawfully authorized to receive the same, all and every sum and sums of money which he *Edge* should or might from time to time collect and receive from the inhabitants and parishioners of the said parish, for or on account of any tax or taxes, duty or duties, then imposed, or *which should or might thereafter be imposed on them* by virtue or under the authority of any act or acts of parliament, without any deduction or abatement whatsoever, save and except such allowance and payment, as was usually made to the collector or receiver of such taxes or duties. The defendant thereupon pleaded, in his fourth plea, that the said office of collector and receiver in the said condition mentioned, at the time of the making the supposed writing obligatory, was, and still is an annual office, and that at the said time, *Edge* held the said office, and was such collector and receiver as aforesaid for the then current year, which year expired long before the commencement of this action, to wit on the 5th of *April* 1797; and that the supposed writing obligatory was made and delivered to secure the payment of all such sums of money only as *Edge* should from time to time collect and receive from the inhabitants and parishioners of the said parish, for and on account of all such taxes and duties as aforesaid *during the said year*: and so the defendant pleaded performance of the condition by *Edge during the said year*.

Replication. That *Edge* held the office of collector and receiver of taxes and duties under the authority of

divers acts of parliament, and was such collector and receiver as aforesaid not only for the said year in the said plea mentioned, but also for divers years after that year, to wit, from thence to the day of exhibiting the plaintiffs' bill against the defendants in this respect, and further that he *Edge* after the making of the writing obligatory, and whilst he held such office and was such collector and receiver as aforesaid, to wit on the 6th of *December* 1796, and on divers other days and times between that day and the day of the exhibiting of the plaintiffs' bill against the defendants in this behalf to wit, at, &c., did collect and receive from the inhabitants and parishioners of the said parish of *Carshalton*, for and on account of divers taxes and duties imposed on them, by virtue, and under the authority of divers acts of parliament, divers large sums of money in the whole amounting to the sum of 10,000*l*. Yet the said *Edge* did not, nor would (although often requested so to do,) well and truly pay, &c., (in the words of the condition) but hath hitherto wholly neglected and refused, &c. Demurrer, Joinder.

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*Richardson*, in support of the demurrer, contended that the responsibility of the surety was to be confined to the then current year, which expired in *April* 1797; and for this he relied on *Lord Arlington v. Merricke* (a), *Liverpool Waterworks Company v. Atkinson* (b), and *The Wardens of St. Saviour's, Southwark, v. Bostock* (c). The principle of those cases is this, that although the words of the condition be general and indefinite as to time, yet they ought to be construed but for the

(a) 2 *Saund* 411.(b) 6 *East*, 507.(c) 2 *N. E.* 175.



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time for which the office recited in the condition, to which they relate, is limited to be holden; because that is most agreeable to the intent of the condition. Therefore in all those cases, though the words used were as general as these, yet were they construed to be restrained by the recital. It is true indeed that the recital in the two first of those cases stated the appointment to be for a specific time, and here it does not; but neither did it in *St. Saviour's, Southwark, v. Bostock*, but there, as here, it was made good by pleading, and shewn to the Court to be an annual office; and thereupon the Court said that they could not distinguish it from the *Liverpool Waterworks v. Atkinson*. And it was reasonable so to hold; for what is the difference whether by the recital or by reference to the act of parliament the office appears to be annual? the intent of the condition must be equally the same. And by the construction which the plaintiffs would put upon it, if this obligation may be enforced beyond the current year, it may be at any time during the surety's life, and there are no means, by notice or otherwise, by which he can disengage himself from the obligation, however much the principal may have misconducted himself: or if it is to last as long as the principal continues in office, then the executors may be called upon long after the decease of the surety, and after the assets have been distributed.

*Taddy*, contra, admitted that the rule had been given in *Lord Arlington v. Merricke*, and that subsequent cases had conformed to it; but he contended that the rule was no more than this, that in order to collect the intent, the Court will look, not to the obligatory

gatory words alone of the bond, but also to the recital and condition; and if from the whole the intent appear to be to contract only a limited responsibility, it shall receive such a limited construction. Now as to the intent, the difference of *Lord Arlington v. Merricke* from the present case is this, that there the recital was express that the party was deputed to exercise the office for six months, and the condition was for the faithful performance of the duties of the *said* office. So, in the *Liverpool Waterworks v. Atkinson*, it was recited that he was to collect the rents for twelve months, and the condition was for his fidelity *during the continuance of such his employment*. So that in both those cases the words of the condition expressly referred to the recital, in which a time was mentioned, and were restrained to it. But in this case the words in the condition, "from time to time, and at all times hereafter," are indefinites of themselves, and do not relate to the recital; neither does the recital mention any time; but the words are, "that he has been and still is collector, and that he collects and receives;" which rather import a continuing duty. And if this condition is to be restrained to the current year, it will in fact only operate for three months; and what becomes of that part of the condition which extends "to taxes hereafter to be imposed," unless the intent was to continue it during subsequent years? That part of the condition must be altogether rejected, for it cannot be supposed to mean taxes to be imposed during the three months, as neither the land-tax nor any of these taxes are imposed during the fraction of a year. Therefore the words of the condition were designedly left at large for all the time that *Edge* should collect and receive, without marking out any time.

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And so this action may well stand with what was said by Lord *Ellenborough* C. J. in *Sansom v. Bell* (a), that where the time for which a surety shall be liable is definitely marked out in the recital, the condition is not to be extended by any subsequent general words. It must be admitted, however, that *St. Saviour's, Southwark, v. Bostock* is a strong authority on the other side, for there the appointment was not recited to be limited as to time, and the condition was for the accounting for all monies received on account of the then rates, as also all and every other rate or rates *thereafter* to be made, and collected; but it is to be observed that the recital expressly referred to an appointment made on a particular day, and the rate, of which he was appointed collector, was a church-rate, so that there might be subsequent rates during the year of office to satisfy the words "all and every rate or rates hereafter to be made;" and the Court do not appear to have adverted at all to those words.

*Richardson*, in reply, contended, that if other taxes might be imposed during the current year, that was sufficient to satisfy that part of the condition which related to taxes hereafter to be imposed, without extending it to another year; in the same manner as in *St. Saviour's, Southwark, v. Bostock*, the possibility that there might be another church-rate within the year was probably deemed sufficient to answer the terms of the condition relating to future rates. With respect to that part of the recital which is said to import a continuing duty, it is not near so strong to that intent, as the word *annually* in the condition in the *Liverpool*

(a) 2 Camp. N. P. C. 39.

*Waterworks v. Atkinson*, or as that part of the condition in *St. Saviour's, Southwark, v. Bostock*, which spoke of accounting with "the wardens for the time being or thereafter to be."

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Lord ELLENBOROUGH C. J. said that the Court would look into the cases; that he believed *St. Saviour's, Southwark, v. Bostock*, was the only case where the limited period of the office did not appear on the condition.

*Cur. adv. vult.*

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court, in substance as follows:

Having stated the pleadings, His Lordship said, The question for the opinion of the Court is, whether under the condition of this bond the defendants' testator, as surety for *J. Edge*, was liable for the arrears of monies received by *Edge* as such collector or receiver in any year subsequent to the year which expired in 1797, in the course of which, viz. on the 5th of *December* 1796, this bond was given. The recital, which is a proper key to its meaning, states that *Edge* had been for some time and then was collector and receiver of the land-tax, &c., (that being an annual tax, and *Edge*, as receiver, being an annual officer,) by means whereof, that is, of being then collector and receiver of those duties, the said *Edge* received and collected, that is, then received and collected, divers sums. It is to be observed, that in this recital not one word occurs describing an act or intimating a receipt beyond the limits of the then current year of collection. The words alone from which an inference is to be collected are to be found in the

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condition, viz. "all and every sum of money which he the said *John Edge* should or might from time to time receive from the inhabitants of *Carshalton* on account of any taxes then imposed, or *which should or might thereafter be imposed* on them by any act of parliament." Here is an express mention of duties *thereafter* to be imposed, which shews, (as it is contended for the plaintiffs,) that the surety meant to continue his responsibility beyond the period of the current year; inasmuch as it could not be supposed probable that any duties would be imposed, so as to come into collection, between the 5th of *December* and the 5th of *April* following. On the construction of this part of the condition the whole question turns. Assuming it to be improbable that taxes should be imposed between the times above stated, still it was not impossible; and the words might have been introduced *ex abundanti cautela*; and certainly they do not necessarily import that the duties should be collected by him after the expiration of the current year. And the words of the recital, which afford the best ground for gathering the meaning of the parties, do not advert to any such collection. Besides, as the consequence of giving to the condition a more enlarged construction, so as to extend the responsibility beyond the current year, would be of so grievous and burdensome a nature, we think it requires more clear and certain words than are to be found in this instrument. If the bond may continue beyond the current year, it may do so for the life of the collector, during the whole period of his remaining in office; it will attach on the surety whenever the person for whom he undertakes is in default; and we know of no means subsisting at com-

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mon law by which the surety can redeem himself from this interminable risk. All the cases from *Lord Arlington v. Merricke* to the last case of *St. Saviour's v. Bostock* in 2 *N. Rep.* 175. have narrowed the construction of conditions of this sort to the actual term of the office. The difference to be found in the words of the condition in this case is not, we think, such as will warrant us, in fair construction, to extend the limits of this responsibility beyond those of the former cases. In conformity with those cases we are of opinion, therefore, that the condition of this bond does not extend the responsibility of the surety for the receiver beyond the current year of his office; and consequently that this demurrer to the replication to the fourth plea is sustainable, and there must be

Judgment for the Defendants,

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GLENNIE against The LONDON Assurance  
Company.

Tuesday,  
Feb. 8th.

COVENANT upon a policy of assurance, dated the 3d of December 1810, for 2600*l.*, at and from *Charleston* to *Liverpool*, upon goods in the ship *Herschell*, until the same should be there safely discharged and landed; and by the policy the assurance was declared to be "on goods, rice, free from particular average." The declaration stated that the goods

Insurance at and from *C.* to *L.* on goods, in a ship by name, until the same should be there safely discharged and landed, rice free of particular average, and the ship with rice and other

goods arrived within the limits of the port of *L.*, but before she could be brought to her moorings or be at all unloaded, ran aground and was wrecked, and the whole cargo was greatly damaged, and was taken out of her in craft, and carried to the consignees at *L.* and sold, and produced upon the whole little more than sufficient to pay freight and salvage, but the rice did not produce sufficient to pay the freight: Held that this was a case of particular average only, and therefore as to the rice the underwriter was exempted by the warranty.

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were loaded at *Charleston*; that the ship sailed upon the voyage with the goods on board, and that before they could be safely discharged and landed at *Liverpool* the ship struck upon the ground; by reason whereof she filled with water, and thereby the goods, before they could be safely discharged and landed, were wholly lost. Breach, non-payment of the sum insured. Plea, non infreg. conventionem, and the defendants paid into court the sum of 500*l.* At the trial before Lord *Ellenborough* C. J. at the *London* sittings after *Michaelmas* term 1812, a verdict was found for the plaintiff for 1993*l.* 9*s.* 8*d.*, subject to the opinion of the Court on the following case:

The policy on which the action is brought was effected by the plaintiff on the account of one *Vigers*, who shipped on board the *Herschell* at *Charleston* for *Liverpool* a cargo consisting of several hundred barrels and half barrels of rice, bales of cotton, and staves, which were together of the value of 9800*l.*, and insured to that amount. The ship set sail with her cargo upon the voyage on the 16th of *October* 1810, and met with tempestuous weather during the voyage, from which she received considerable damage, and became leaky, and shipped great quantities of water. On the 5th of *December*, being then about five miles from *Liverpool*, she got a pilot on board and continued her course for that port, but before she could be brought to her moorings, or be at all unloaded, she unavoidably took the ground (a), filled with water, and

(a) It appeared upon the argument that she was then within the limits of the port of *Liverpool*; it was said to be in her endeavour to get into the dock-gates that she struck aground.

became

became a perfect wreck, The whole of the cargo was greatly damaged, and the rice was so much swelled from the salt-water, that many of the barrels containing it were burst. The cargo was taken out in craft, and on flats, whilst she was lying in the state above mentioned, and carried to the consignees at *Liverpool*, and necessarily sold by them for the benefit of the concerned. The nett produce of all the goods saved, after paying the freight, and salvage, amounted to 401*l.* 9*s.* 9*d.* The rice would of itself have netted much more than the sum insured, if the misfortune had not happened, but being damaged, produced only the sum of 972*l.* 7*s.* 10*d.*, and the freight of it amounted to 1762*l.* 8*s.* 6*d.* All the cargo was included in one bill of lading, and the freight of the whole was less than the value of the cotton and staves. The ship being irreparable in consequence of the accident, was immediately after the discharge of the cargo, *bonâ fide* sold as a wreck, and broken up. The 500*l.* paid into court are sufficient to cover the defendants' proportion of the loss upon the staves and cotton only.

The question for the opinion of the Court is, whether the loss is, under the circumstances, a particular average, from which the rice is excepted, or a total loss of the rice, with benefit of salvage to the underwriters; and if the latter, (then another question was submitted which became immaterial). If the Court should be of opinion that the loss on the rice is a particular average, then a nonsuit to be entered.

*Marryat*, for the plaintiff, contended for a total loss with benefit of salvage. He admitted, that if the thing insured subsist in specie, and arrive at the place of destination

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destination *in the ship*, that the underwriter will be discharged by reason of the warranty from particular average; but here he said that the rice never did arrive at *Liverpool in the ship*, for the case finds that before the ship's arrival she became a perfect wreck, and her cargo was taken out of her while lying in that state, and brought in craft to *Liverpool*. And there is not any case where the underwriter has been holden discharged by this warranty, unless the ship has arrived, or was in a condition to do so. Neither is there any case where the ship, having been wrecked before arrival, the underwriter has been discharged merely on account of the cargo's having come to the hands of the consignee, unless that cargo has been productive of profit to the assured beyond the freight and expences of getting it ashore. But here the cargo was not productive of any profit, the proceeds being little more than barely to pay the unavoidable expences of freight and salvage; therefore there has been a total loss. And he mentioned a case of *Buller and Others v. Christie*, before Lord *Ellenborough C. J.*, *London sittings after Mich. term 1806*, to shew that where the goods do not arrive in the ship the loss is total. That was an insurance on 1950 boxes of soap on board the *Young Peter*, at and from *Liverpool to Oporto*. The defendant paid into court 20 per cent. upon his subscription. The ship, in attempting to pass the bar in order to get into the harbour of *Oporto*, ran aground without the bar, and there bulged. The water flowed in and wetted that part of the soap that was towards the bottom of the hold, but out of the 1950 boxes only 17 were totally lost; the rest were saved and carried ashore in barges, and delivered into the warehouses

of the assured; and it appeared that they had sustained damage from the sea-water not exceeding 204 per cent. Sir *V. Gibbs*, for the assured, contended, that the loss was total, inasmuch as the ship had never arrived, but before arrival became totally lost; and that the circumstance of the goods having reached their destination and the hands of the consignees, would not vary the case. *Garrow*, contra, insisted upon the necessity of an abandonment. But Lord *Ellenborough* C. J. held it a total loss without abandonment. So in this case the ship has never arrived; for, admitting that she arrived within the limits of the port of *Liverpool*, yet she never reached the place where she could safely discharge and land her cargo, being wrecked before she could be brought to her moorings; and the policy is to endure till the goods are safely discharged and landed.

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LORD ELLENBOROUGH C. J. I think it quite clear that this is a case of particular average and not of total loss. There has been an arrival of the ship with the goods at their destination; the voyage has been performed, and the goods have come to the hands of the consignees. The argument is built upon facts which are not in the case; it assumes that the ship did not arrive in port, whereas there seems to be little doubt that she was within the port when she took the pilot on board. Therefore this is not a case of total loss of the goods on account of the non-arrival of the ship; the ship had got within the practicable limits for her discharge: it is only a case of particular average. In the case mentioned, the ship was lost off the bar, without the limits of the harbour, which was the same thing

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thing as if she had been lost on the high seas; there was a total loss of voyage as far as respected the ship; she had neither arrived nor could she arrive: here she both could and did arrive. Taking it, therefore, that the ship and cargo were united for that adventure, there the conjoint adventure of the ship and cargo was disappointed. As to the argument that the goods did *not* produce a profit to the assured, that depended upon the state of the market; they might have produced profit in a season of scarcity. But we cannot look to that, and if we could, it appears that the rice, which is said to be totally lost, did produce 972*l*. Assuming it to have produced nine-tenths less than its value, that will not make it a total loss.

BAYLEY J. The question is not whether by the arrival of the ship the underwriter is discharged from the policy in respect of a partial loss of the goods occasioned by the wreck of the ship before she could gain her moorings, but whether he is to be charged with a total loss of the goods on account of the non-arrival of the ship. It is a question whether the goods can be said to have reached their destination at all, not whether they have not reached it in a deteriorated state. Upon that I would ask what has produced the 972*l*. but the rice, which it is contended has been wholly lost.

DAMPIER J. referred to *Davy v. Milford* (a), where upon an insurance on flax on board a ship by name, and for a specified voyage, with a warranty free of particular average, and the ship was wrecked in the voy-

(a) 15 *East*, 559.

age, before arriving at her destination, and only a part of the flax was saved, which was sold on the spot in a damaged state; yet it was holden to be only a particular average as to that part which was saved.

*Per Curiam,*

Judgment of nonsuit.

*Moore* was to have argued for the defendant.

### HILL *against* MONTAGU.

*Tuesday,*  
*Feb. 8th.*

**D**EBT on bond. The defendant, after oyer of the bond and condition, which was for the payment of 2000*l.* at 18 months from the date, pleaded, (among other pleas), that the supposed writing obligatory was made and entered into by the defendant, under and by virtue and in pursuance of a certain corrupt contract, made after the 29th of *September 1714*, to wit on the 16th day of *February 1799* at *London*, in the parish and ward aforesaid, between the plaintiff and the defendant, whereupon and whereby there was reserved above the rate of 5*l.* for the forbearing of 100*l.* for a year, contrary to the form of the statute in such case made and provided; whereby, and by force of the same statute, the supposed writing obligatory was and is wholly void in law: and this he the defendant is ready to verify; wherefore he prays judgment if he ought to be charged with the said debt by virtue of the supposed writing obligatory, &c.

A general plea of usury held ill on special demurrer.

Demurrer assigning for causes that the defendant by his said plea alleges that the said writing obligatory was made in pursuance of a corrupt contract, &c., (in the words

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words of the plea,) but does not by his said plea allege or specify any of the particulars of such contract, nor the time of such forbearance, nor the sum to be forborne, nor the sum to be paid for such forbearance; and also for that the said plea is in other respects uncertain, &c.

*Lawes* was called on by the Court to support the plea, and admitted that this plea would anciently have been thought informal; but contended that the same strictness was not required of late times, and that as usury might be involved in a variety and complication of facts, this form of pleading was convenient for the avoiding of prolixity, and could not injure the plaintiff, because he must be supposed cognizant of the nature of the contract.

LORD ELLENBOROUGH C. J. Usury is not like fraud and covin, which usually consist of a multiplicity of circumstances, and therefore it might be inconvenient to require them to be particularly set forth. But has this form of pleading ever been in use before? The corrupt contract ought to be particularly set forth, and the usurious interest, that the party may know what to answer. The party against whom it is pleaded may be aware of the contract, but he cannot know in what particulars it is meant to be assailed, or wherein the other side imputes vice to it.

BAYLEY J. I have always understood that the party who pleads a contract must set it out, if he be a party to the contract. It lies as much within the knowledge of the defendant as the plaintiff.

DAMPIER

DAMPIER J. I have seen a general plea of covin, but never before of usury.

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*Per Curiam,* Judgment for the plaintiff. (a)

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*Walton* was in support of the demurrer.

(a) See *Hinton v. Roffey*, 3 *Mod.* 35. S. C. 2 *Show.* 329. *Tate v. Wellings*, 3 *T. R.* 531.

### The KING against H. D. PERROTT.

Wednesday,  
Feb. 9th.

**E**RROR to reverse a judgment of imprisonment given at the *Lent* assizes 1812 for the county of *Kent*, upon a verdict of guilty there found on an indictment for obtaining bank notes and money by false pretences; to which indictment the defendant pleaded not guilty.

The first count of the indictment charged, that before and at the several times of committing the several offences, &c., one *Bullen* was a person liable to be impressed as a seaman in his majesty's navy; that a little before the time of committing the offence by the defendant, hereinafter next mentioned, a certain discourse had been had between the said *Bullen* and *Elizabeth* his wife, and the defendant, touching and concerning the obtaining a protection from the commissioners for executing the office of lord high admiral of the United Kingdom of *Great Britain* and *Ireland*, to secure and exempt *Bullen* from being impressed as a seaman in his majesty's navy, and the defendant had then and there proposed and offered that he the defendant would apply for such protection for *Bullen*; that the defendant

being

An indictment on 30 G. 2. c. 24. for obtaining money by false pretences, must negative by special averment the truth of the pretences; it is not enough to charge that the defendant *falsely pretended*, &c. (setting forth the pretences), by means of which *said false pretences* he obtained the money, &c.; therefore for want of such averment in the indictment the Court reversed the judgment.

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being an evil disposed person, and contriving and fraudulently intending to cheat and defraud *Bullen* of his monies, &c., afterwards, to wit, on the 15th day of *December*, in the 52d year of the reign of *George* the Third, with force and arms, &c., unlawfully, wickedly, knowingly, and designedly, *did falsely pretend* to the said *Bullen* that he the defendant could obtain such protection for *Bullen*, by favour from the lords of the admiralty, by seeing the clerks, as he had an uncle a lord of the admiralty, and that it would be no great expence, as he could get it done through favour; that the defendant contriving and fraudulently intending as aforesaid, afterwards, to wit, on the 16th of *December*, in the 52d year of the reign aforesaid, with force and arms, &c., unlawfully, wickedly, knowingly, and designedly, *did again falsely pretend* to *Elizabeth* the wife of *Bullen*, that he could get the protection for six pounds, that as *Mr. Read* could get it done, that the six pounds were to give to *Mr. Read* for getting the protection: *by means of which said several false pretences*, the defendant afterwards, to wit, on the same day and year last aforesaid, at the parish and county aforesaid, unlawfully, knowingly, and designedly, did obtain from the said *Elizabeth*, the wife of the said *Bullen*, divers, to wit, five promissory notes of the governor and company the Bank of *England*, for the payment of one pound each, &c., and also the sum of one pound in money, of the promissory notes and monies of the said *Bullen*, with intent then and there to cheat and defraud the said *Bullen* of the same, in contempt of our said lord the king, &c., against the form of the statute, and against the peace, &c. The indictment contained ten other counts in a similar form.

And

And the error assigned was, that there is not in any or either of the several counts of the said record of indictment any averment or averments, to falsify the matter or matters of the several pretences in the several counts of the said record of indictment, severally and respectively contained, &c., by which it can appear to the Court here, upon the face of the said record of indictment, that any or either of the pretences, so as aforesaid severally and respectively alleged in the several counts of the said record of indictment, against the defendant, to have been severally and respectively falsely pretended by the defendant, or any or either of them, are or were false and untrue: concluding with an assignment of the general error.

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*Knowlys* in support of the errors assigned, took exception to the indictment, because it is not shewn by any averment, negating the truth of the alleged false pretences, that the pretences were false; and without such averment the Court cannot intend that they were false, by reason that it is alleged that the defendant did falsely pretend, &c. And he referred to 2 *Hawk.* c. 25. s. 60. to *Long's* case (a), *Rex v. M'Gregor* (b) and 2 *Hale, P. C.* 193. to shew generally, that an indictment ought to be certain to every intent, without any intendment; and that the want of any material allegation cannot be supplied by implication; neither is a defective indictment aided by verdict. And he said that the omission of the averment negating the truth of the pretences could not be supplied by the words that "he did *falsely* pretend;" because the law did not attach

(a) 2 *Hale's P. C.* 182. S. C. *Cr. Eliz.* 490. (b) 3 *Bos. & Pull.* 107.



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any peculiar or technical force to the word *falsely*, so as to make the use of it in itself equivalent to a positive averment of the falsehood of the thing, in respect of which it is predicated. And therefore in *Rex v. Airey* (a), it was holden not to be necessary to allege that he *falsely* pretended; which could not have been, if the word *falsely* were technically descriptive of the falsehood of the pretence. There is not any instance of an indictment, such as this, having been upheld; and if it may be in this instance, why may not an indictment for perjury be good without averring that the matters are false? The two crimes are in their nature nearly allied, falsity being the essence of both; and according to this, it would be sufficient in perjury merely to allege that the defendant falsely swore, setting out the matters, and so conclude that he did commit perjury. And yet not only is there not any precedent of such an indictment, but the statute (b) for rendering prosecutions for perjury more easy and effectual, expressly recognizes the necessity of such indictments containing "the proper averments to falsify the matters wherein the perjury is assigned."

*Jervis*, contra, maintained, that there was not any difference in substance between an allegation that he did falsely pretend, and an allegation that he did pretend, whereas in truth and in fact such pretence was false. Either mode was sufficient to shew to the Court the falsity of the matter, and apprise the defendant of the offence charged against him; which is all that is required. As to the falsity, its being laid falsely is as

(a) 2 East, 30.

(b) 23 G. 2. c. 11.

direct a mode of negating the truth, as if it had been specially negated; and according to *Rex v. Airey* it is not necessary to do both. In *Carpenter v. Tarrant* (a) Lord Hardwicke, speaking of the necessity of averring the falsity in an action of slander, said that he took it, that the words being laid to be spoken false et malitiose, was an averment that the words were false; for if they were spoken falsely the words could not be true; and if they were true, it lay upon the defendant to shew that in mitigation of damages. So here, if he falsely pretended, the pretences could not be true; and if they were true, according to Lord Kenyon, in *Rex v. Young* (b), it was competent to the defendant to have proved it in his defence. Then as to the notice which this indictment afforded to the defendant of the charge imputed to him, the pretences are all set forth in particular, and so it is not like *Rex v. Mason* (c), and the whole of them is negated by the allegation that he falsely pretended; and the defendant had this advantage from the indictment's not separately negating the several pretences, but only in the general, that unless the whole had been proved to be false, he would have been entitled to an acquittal; whereas if they had been separately negated, he might have been convicted upon proof of the falsity under any one averment, though under all the others he might have been able to prove that they were true. And supposing the prosecutor had negated separately the truth of the pretences one by one, which he might have done, though one only out of the whole was false, and still the indictment would have been good; that

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(a) *Cas. temp. Hardw.* 34. (b) 2 *T. R.* 581. (c) 3 *T. R.* 102.

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would only have been doing the same thing in a more circuitous way which the prosecutor has now done in a more compendious one, and still the indictment would have afforded no more notice of the charge to the defendant than it has now done. Also as to stat. 30 G. 2. c. 24., upon which this indictment is framed, the rule is, that the indictment must bring the fact within the express prohibition of the statute, otherwise it will be insufficient. The words of the statute are, that "all persons who knowingly and designedly by false pretences, &c. shall obtain money, &c. with intent to cheat any person &c. shall be deemed offenders, &c." And this indictment brings the fact within the express prohibition and very letter of the statute, for it alleges that he did falsely pretend, and by means of such false pretences did obtain money, &c. with intent to cheat, &c. And no analogy can be drawn in this respect from the practice upon indictments for perjury; because that offence is not the same in its nature, and there is also a difference in the mode both of charging and proving it. Perjury is a false affirmation upon oath, this a false affirmation only; in perjury, every assignment is in the nature of a fresh count, and is distinct from the rest, and does not require the whole to sustain it; in this offence, the whole which constitutes the entire pretence must be alleged; there the crime must be proved by two witnesses, here it need not. Therefore the statute which relates to perjury, and the proper averments required in that case cannot be supposed to apply to this; and if it could, it has not said that such an averment as this is not a proper averment.

*Knowlys,*

*Knowlys*, in reply, denied that in all cases it was sufficient, in order to bring the fact within the prohibition of a penal statute, if the indictment pursued the very letter of the statute; and said that *Rex v. Mason* proved that it was otherwise in this very case. And he was proceeding, but was stopped by the Court.

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LORD ELLENBOROUGH C. J. I think we need not trouble you farther. Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him. The legislature have so held, and have recorded their opinion to that effect in the case of perjury, in stat. 23 Geo. 2. c. 11. (by which they relieved the party prosecuting from many of the forms theretofore incumbering the prosecution of that charge,) when they enacted that it should be sufficient to set forth the substance of the offence charged, together with the proper averments to falsify the matter wherein the perjury is assigned. The legislature, when they so enacted, must have contemplated a form of prosecution in which the word falsely, as a prefatory allegation, was generally, if not always, used; and we must consider them as thinking that not a sufficient allegation to falsify the matter without the proper averments. The legislature, therefore, with reference to that species of prosecution, have declared their opinion to be, that such averments should be found in every information or indictment for perjury. I have listened with great attention to the arguments of the learned counsel for the crown; but I confess I cannot see any distinction in this respect between an indictment for perjury and one for false pretences.

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pretences. What more is there in perjury than a false pretence or affirmation on oath? and in what does a false pretence differ from perjury but that it is not on oath generally, but only a false affirmation, amounting to a pretence, unaccompanied with an oath? the falsifying of the one and the other, as it should seem, ought to be governed by the same rules. When a party, therefore, is called on to answer for obtaining money by a false pretence, it is but reasonable that he should have the same notice as in perjury, by proper averments of that which is intended to be relied on against him. To state merely the whole of the false pretence is to state a matter generally combined of some truth as well as falshood. It hardly ever happens that it is unaccompanied with some truth. Suppose the offence, instead of being comprized within five or six separate matters of pretence, as here, had branched out into twenty or thirty, of which some might be true, and used only as the vehicle of the falsity, are we to understand from this form of charge that it indicates the whole to be false, and that the defendant is to prepare to defend himself against the whole? That would be contrary to the plain sense of the proceeding, which requires that the falsification should be applied to the particular thing to be falsified, and not to the whole. And the convenience also of mankind demands, and in furtherance of that convenience it is part of the duty of those who administer justice to require, that the charge should be specific, in order to give notice to the party of what he is to come prepared to defend, and to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be im-

peached for falsehood. The legislature have expounded their understanding of the matter in the case of perjury, and I am at a loss to discover why in reason, in justice, and in mercy to the party, the charge in this case should not be as distinctly ascertained by proper averments that specifically draw his attention to it, as in the case of perjury. It has been argued, that perhaps every one of these charges may be false; but the rule, as it has been derived from cases of a mixed nature, where part is true and part false, has introduced a course of separating, by specific averments, all that which is meant to be relied on as false. The analogy to the crime of perjury is so strict, and justice also suggests the same, that I think it should be specifically announced to the party by distinct averments what the precise charge is. It has always been done upon indictments for obtaining money by false pretences, and whenever a more general form of indictment has come under consideration it has not met with countenance, but the Court, as in *Rex v. Mason*, have reprobated it. If it were good, every man might be brought into court without any possibility of knowing how to defend himself. Therefore, for convenience sake, and for the manifestation of the crime imposed, I think that which the legislature have authoritatively announced to be necessary in the case of perjury, must also be done in this case; and therefore that this judgment must be reversed.

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PERJURY.

LE BLANC J. On this writ of error the question arises upon the indictment; and the question is, whether, on the face of this indictment, it is a sufficient compliance with the terms of the act of parliament,

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and the known rules of law, for the indictment to allege "that the defendant did falsely pretend, &c., by means of which said several false pretences the defendant did obtain divers promissory notes, &c.," without alleging that each particular thing which goes to make up the false pretence, or such of the things as are meant to be insisted on, are false. That is the single question on this indictment. In the first place, it is necessary to look to the words of the stat. 30 Geo. 2. c. 24.: they are "that all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person money, &c. with intent to cheat or defraud any person of the same, &c. shall be deemed offenders, &c." The argument has been, that if the indictment pursues the words of the act of parliament, that is enough to shew it an offence within the act. But that rule will not hold universally; because it is not always enough that the indictment follows the words of the act. If it were sufficient to follow the words of the act, it might be argued, as in the case of *Rex v. Mason*, that to allege merely that the party did obtain money by false pretences, without stating of what those pretences consisted, would be sufficient. But in that case the Court held, that such a form of allegation was insufficient; and that the indictment must not only state that the money was obtained by false pretences, but must go on further to shew, what those pretences are. The question then here is, whether it be a sufficient compliance with the act of parliament and the known rules of law to state that the defendant did falsely pretend, (setting out the false pretences,) without going on further to aver that those pretences were false. The argument is, that alleging that the defendant did

falsely pretend, &c. generally, and in a lump, is equivalent to an averment that each of those pretences was false. But a number of pretences may consist of some facts which are true and some false; and it is a necessary rule in framing indictments that not only the offence should be truly described, but that it should be described in such a manner as to give the party indicted notice of the charge. Therefore when a party is charged with obtaining money under false pretences, the indictment ought to state in what particular such pretences are false. Here it is charged in the first count, "that the defendant did falsely pretend that he could obtain a protection by favour from the lords of the admiralty by feeing the clerks, as he had an uncle a lord, and that it would be no great expence." Now that is a pretence consisting of several facts, part of which may be true and part false. It may be true that he had an uncle a lord of the admiralty, and if he had, it does not follow that the rest may not be true; therefore the indictment should have charged what part was false. It is perfectly true that the indictment might negative, one by one, every one of the false pretences, and that that would not vitiate though some were true. But the Court will not suppose that that will be done if it be in the knowledge of the prosecutor that some of them are true. Therefore it shall be stated in the indictment, which are true and which false, in order to apprize the defendant of the particular branch of the charge meant to be insisted on. I cannot see why the same rules which have been observed so long, and recognized by the legislature as necessary in the crime of perjury, should not be adopted in this case. In perjury it is not enough

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to use the word falsely, without going on by averment to negative that which is false. A person has deposed on oath to a variety of things: in order to assign perjury it must be shewn what part is charged as false. Although it is competent for the party to allege that the whole is false, yet the law will not presume that he will do that; and therefore it is necessary to shew which is false, that the party indicted may be apprized of it. If this argument required any additional strength it would derive it from the constant course of precedents, as well on this statute as on the statute of perjury. This, as far as I am aware, is the first indictment of this sort, and, as it appears to me, is erroneous; and therefore I think that this judgment must be reversed.

BAYLEY J. I entirely agree that judgment ought to be reversed. I think the rule is, that the defendant ought to be apprized of the charge, and that this indictment does not apprize him. Upon an indictment for obtaining money under false pretences, the whole assertion which induces the party to part with his money must be stated, part of which may be true and part false: if falsehood be an ingredient contributing to the obtaining the money that will be sufficient. Here it is contended that the word falsely imports that falsehood pervades the whole allegation. If I were satisfied that that proposition were correct I might then be of a different opinion; but the form of indictment for perjury satisfies me to the contrary, because it states that the defendant falsely swore upon the whole matter, and yet that does not amount to negating the truth of the whole, but the indictment goes

on

on by averment to negative each particular. That shews that the general allegation by the word falsely does not necessarily pervade the whole. If it does not, then it is a duty owing to the defendant to point out in what particular it is meant to rely on the falsehood, otherwise he cannot be apprized of it. It is very true, that on this indictment the false pretences only consist of five or six propositions, but it would be the same thing if it consisted of twenty times the number. The analogy to the case of perjury is so strong as to afford a safe rule. I cannot see any material distinction between the cases. Upon this short ground, then, that the word falsely does not import that the whole of the allegation is untrue, I am of opinion that in this case it should have been pointed out what is untrue.

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DAMPIER J. This indictment states that the defendant falsely pretended, &c., by means of which false pretences he obtained divers promissory notes and money, &c. I was at first struck with the argument that the allegation that he falsely pretended negatived the whole, and was in effect the same as if the indictment had gone on to negative every part. And if such had been its effect, then the language of *Lawrence J.* in *Rex v. Airey* would have applied. But on consideration of the precedents in cases of perjury, I think that is not its effect. There is a close analogy between this and the case of perjury: in both falsity forms the main ingredient, but need not pervade the whole; in both therefore it is necessary to point out what is false. The 23 G. 2. c. 11., which mentions that there must be proper averments, shews that the single word "falsely" prefixed to the oath in the case of perjury, and so in this

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this case to the false pretence, is not an apt averment to negative the truth of the whole. Upon every indictment for perjury which I have ever seen it has always been alleged that the defendant falsely swore, &c.; and when the proper averments come to be made, it is not necessary to negative the whole, but only such parts as the party can falsify, admitting the truth of the rest; therefore that shews that the word falsely in the preceding part of the indictment does not import that the whole is false; for if it did, the effect of the word falsely, pervading the whole, would not be taken off by the subsequent averments as to part, so as to leave the rest true; and if that were so, all such averments upon indictments for perjury would be superfluous, and it would be enough to allege that he falsely deposed to the whole matter. But it may be necessary to set forth the whole matter, though some of the circumstances have a real existence, in order to make the rest intelligible; the word falsely therefore does not import that every thing which is comprehended under it is false; and therefore it appears that the averment in perjury is necessary to shew what is false. So in this case for the same reason it is necessary to point out by averment what it is that the prosecutor charges as the false pretence, and what the defendant ought to come prepared to defend. And because this indictment contains no such averment, I think it is ill.

Judgment reversed.

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PHILLISKIRK, and SUSANNAH his Wife, *against* Wednesday,  
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PLUCKWELL.

**A**SSUMPSIT by husband and wife on a promissory note, dated 31st Aug. 1812, made by the defendant to the wife, whereby the defendant, three months after date, promised to pay to her, by the name and description of Mrs. *Susannah Philliskirk*, or order, the sum of 10*l.*, and three months after, the like sum of 10*l.*, for value received by the defendant; whereby, and by force of the statute, the defendant became liable to pay the *plaintiffs* the said sum of money contained in the said note, according to the tenor and effect of the said note; and being so liable, &c.: with the money counts. Plea, general issue.

Husband and wife may sue on a promissory note made to the wife during coverture.

At the trial before Lord *Ellenborough* C. J. at the *Middlesex* sittings after last term, the note having been produced and proved, it was objected, that as the note appeared to have been given to the wife during coverture, and did not state on the face of it that it was on account of any meritorious consideration moving to her, the husband alone ought to sue. In answer, the case of *Prat v. Taylor* (a) was cited; and a verdict was found for the plaintiffs on the first count in the declaration, and for the defendant on the other counts, with liberty to the defendant to move to enter a nonsuit upon this objection. A rule was accordingly obtained on a former day in this term, and *Bidgood v. Way* (b) was mentioned; and now, upon the rule being

(a) *Cro. Eliz.* 61.(b) 2 *Bl. R.* 1236.

called

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called on, the Court desired to hear the counsel in support of it.

*Topping* accordingly referred more particularly to *Bidgood v. Way*, which he said was an express decision upon error, that the wife could not be joined, because a contract could not be made with a feme covert, and that a promise either express or implied did not give her any interest, but the whole resulted to the husband; and if it should be said that there it did not appear that the lands, out of which the contract was derived, were the wife's lands, in like manner it may be said here that it does not appear that the note was given for any meritorious services or consideration moving to the wife; which, if it had appeared, might perhaps have made a difference. Therefore in *Rose v. Bowler (a)*, *Heath J.* laid down the rule, that where the wife is the meritorious cause of action, there she may join with the husband, but not otherwise, as was evident, he said, from the authorities of *Abbot v. Blofield (b)*, and *Weller v. Baker (c)*. So, in *Brashford v. Buckingham (d)*, assumpsit was held to lie by husband and wife upon a promise to the wife in consideration that she would cure a wound, but there it alleged in fact that she cured it; and on the ground, that it was upon a performance to be made by the person of the wife, it was resolved that she was the cause of the action, and so the action brought in both their names was well enough. And the same distinction was taken and admitted in *Fountain v. Smith (e)*, *Weller v.*

(a) 1 H. Bl. 114.

(b) Cro. Jac. 644.

(c) 2 Wils. 414.

(d) Cro. Jac. 77. 205.

(e) 2 Sid. 122.

*Baker (a)*, and *Holmes v. Wood (b)*. So that those cases go no farther than to shew that where the action is brought for the labour or services of the wife only, she may join. But here the case rests simply on the note's having been made to the wife, and there is not any apparent consideration; she must therefore be taken to have received it merely as the servant of the husband. And so in *Howell v. Maine (c)*, where a bond was given to the wife during the coverture, the husband sued alone, and on demurrer it was adjudged well.

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PHILLISKIRK  
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LORD ELLENBOROUGH C. J. If it had been necessary to state a consideration there might have been weight in the argument; but here, is not the wife the meritorious cause of the action? She is the donee of the promissory note, and it is acquired through her, and the note is a thing which of itself imports a consideration. And in *Coke Littleton*, 120. a., and 1 *Roll. Abr.*, *Baron and Feme*, H. pl. 6 & 7., mentioned by my Brother *Dampier*, a difference is taken between a thing that is not merely a chose in action, and one that is, and therefore in the case of a bond made to the wife, if the wife dieth, the husband shall not have it without taking administration, because that is merely in action. So here the note is made to the wife: and it imports consideration, unless the contrary be shewn; and therefore it seems to fall within those authorities.

BAYLEY J. Does not a promissory note import *prima facie* a consideration for the promise to pay ac-

(a) 2 *Wils.* 424.(b) Cited in *Weller v. Baker*, *ibid.*(c) 3 *Lev.* 403.

cording

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cording to the tenor, that is, to the wife; and what is there to shew that the wife is not the meritorious cause of action? It was incumbent on the defendant to shew the contrary; the note might have been given for a debt due to her *dum sola*. The case of *Holmes v. Wood* was a case where it was necessary to allege an adequate consideration, but here it is not necessary to allege a consideration dehors the instrument, because it imports a consideration of itself.

DAMPIER J. The same argument which has been used to-day would also be an answer to the authorities of *Co. Litt.* and 1 *Roll. Abr.* upon the case of the obligation to the wife. The husband might certainly have sued alone, according to *Howell v. Maine*, which was the case of a bond to the wife *durant* coverture, and not *devant*, as in some editions (a), but it follows from the above authorities that he may also join the wife. There must be some little inaccuracy in the case of *Bidgood v. Way* in one part; because the Court say that no promise to a married woman, either express or implied, gives any interest; and yet they afterwards admit upon the cases, that where a promise is so expressly stated, the husband may assent to give the wife an interest in the contract, and join her in the action. In *Day v. Pargrave* (b), which

(a) See *Selwyn's N. P.* 263. n.

(b) Mr. Ford's note of this case, under the title *Day v. Padrons*, *Trin.* 13 & 14 *Geo. 2.* is as follows: Plaintiff as administrator to his wife brought debt upon a bond given to her during the coverture; and on demurrer to the declaration, it was objected the action should have been brought by the husband in his own right, and not as administrator, because the wife never had any sole right of action in her, 3 *Lev.* 403. 2 *Mod.* 217. *Salk.* 114. 4 *Mod.* 156.

On the other side it was argued, that the right to the bond would have survived to the wife, if she had outlived her husband. *Br. Bar.*  
6 *Pine*,

which was argued by *Taylor* on one side and *Denison* on the other, according to my note, *Lee C. J.* said that where a bond is given to the wife during coverture, no action will lie for it by the wife solely, but they may have a joint action during their lives; or the husband may bring such action during the coverture in his own name; yet if he does not, it survives to the wife. There the action was by the husband, as administrator, on an obligation to the wife during coverture, and it was resolved that it was well brought, for it would have survived to her.

*Per Curiam,*

Rule discharged.

*Bayly* was to have argued against the rule.

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*6 Feme, 24.* And though the bond might have been sued by the husband alone in the wife's lifetime, yet after her death he must sue as administrator, as in the present case. *1 Ro. Ab: 345. H. pl. 6, 7. Co. Lit. 120. a. 351.* And for these reasons the plaintiff had judgment.

**BUSK and Another against DAVIS and Another.** *Wednesday, Feb. 9th.*

**TROVER for flax.** At the trial before Lord *Ellenborough C. J.*, at the *London* sittings after last term, it appeared that the plaintiffs, in *September 1812*, having about 18 tons of *Riga* flax then lying in mats (and entered as mats), at the defendants' wharf, sold a part of it, through the intervention of a broker, to one

Where plaintiffs sold 10 out of 18 tons of flax, then lying in mats at defendants' wharf, at so much per ton, to be paid for by the vendee's acceptance at three months,

and gave the vendee an order on defendants (the wharfingers) to deliver ten tons to vendee or order, which defendants entered in their books, but the quantity to be delivered was to be ascertained by the wharfinger's weighing it, (the mats being of unequal quantities, so that a fraction of a mat might be required), and an allowance for tare and draft was to be made by the weight: Held that the sale was not complete to pass the property, those acts not having been done by the wharfingers, nor any delivery made; and that plaintiffs, upon the insolvency of the vendee, might countermand the delivery.

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D d

*Bromer.*



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*Bromer.* The sold note was in the following terms: Sold on account of *Busk* and Co. 10 tons of *Riga* flax, marked P D R, at *Davis's* wharf, sound and of a merchantable quality "ex" the *Vrow Maria*, at 118*l.* per ton, the amount to be paid by the buyer's acceptance at three months from to-day, allowing six months and 14 days discount. Tare and draft as customary.

*London, 23d Sept. 1812.*

A few days afterwards the plaintiffs gave *Bromer* the following written order on the defendants, which was immediately sent by *Bromer* to the defendants, and entered in their books:

Messrs. *Davis* and Co.

Please deliver to Mr. *D. Bromer* or order ten tons *Riga* P D R flax "ex" *Vrow Maria*.

*Busk* and Co.

$\left. \begin{array}{l} 23 \text{ Sept.} \\ 7 \text{ Oct.} \end{array} \right\} 1812.$

It is usual to allow 14 days for delivery, during which time the sellers are liable for warehouse rent, and the purchaser afterwards. On the 17th of *October* (after the 14 days had expired) *Bromer* stopped payment, and the flax remaining at *Davis's* wharf in the same state as at the time of sale, the plaintiffs gave an order countermanding the delivery. *Riga* flax is usually imported in mats, varying in quantity from 3 to 5 or 6 cwt. The quantity is ascertained by being weighed by the wharfinger (a). The sale of 10 tons

(a) When the rule nisi was moved, *Le Blanc J.* inquired who was to be at the expense of the weighing, and said it might be material to ascertain that fact; but upon shewing cause it did not appear that that fact had been agreed; it seems to have been considered that the wharfingers were at least the agents of both parties.

may require the flax mats to be broken, and tare and draft must be deducted before the bill of parcels can be made out. The tare is allowed by the weight, for the weight of mat and ropes; 14 lbs. upon mats under 3 cwt., and 20 lbs. upon mats of 3 cwt. and over. Draft is 2 lbs. per mat. The plaintiffs had not received any return of the weight from the wharfingers. Under these circumstances his Lordship was of opinion that as an ulterior process of weighing was to be performed by the seller before the delivery could take place, the transfer of the property to the buyer was not complete, that process not having been performed; and thereupon a verdict was found for the plaintiffs.

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*Park* obtained a rule nisi for a new trial, and relied on *Harman v. Anderson* (a), *Whitehouse v. Frost* (b), and *Jackson v. Anderson*. (c)

*Scarlett* and *Brougham* shewed cause, and contended that the sale was not so complete as to vest the property in *Bromer*, and preclude the plaintiffs from countermanding the order for delivery. This was a sale of a certain quantity of flax, the delivery of which was to be ascertained by weight, which weighing was to be done by the wharfingers as agents for the sellers, and until that was done, it remained in fieri what portion of the whole bulk was to be delivered, in order to satisfy the quantity sold. Therefore though the price and quantity were certain, yet the precise thing to be delivered was uncertain, and what remained to be done for ascertaining it was necessarily to precede the

(a) 2 *Campb. N. P. C.* 243.(b) 12 *East*, 614.(c) 4 *Taunt.* 24.

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delivery; and so this case is governed by *Wallace v. Breeds* (a) and *Hanson v. Meyer* (b). In the former, it was stated to be usual, after sale, for the cooper of the seller to search the casks of oil, and for the broker of both parties to examine them with a view to certain allowances, and then the casks were filled up by the seller: in the latter, there was no doubt as to what was to be delivered, for it was a sale of all the starch, but the weighing was necessary to the ascertainment of the price; and in both it was adjudged that these acts which were to precede the delivery were essential to complete the transfer, and that the property was not divested out of the vendors by the mere sale and order on the wharfingers to deliver, but that the vendors might, upon the insolvency of the vendees, countermand the delivery. And in this case, if, after the sale, a fire had consumed the flax upon the defendants' wharf, according to *Rugg v. Minett* (c), the loss would not have fallen upon the vendee. As to *Whitehouse v. Frost*, there are the same circumstances of difference between the present and that case, that Lord *Ellenborough* C. J. pointed out between *Wallace v. Breeds* (d) and that case; and his lordship added that the courts frequently laid hold of such circumstances to retain the property in favour of the unpaid seller. And if those two cases should be thought inconsistent with each other, it may be observed that *Wallace v. Breeds* is later, and was decided upon consideration of the former case. In *Harman v. Anderson* there could be no doubt that the transfer was complete, because no weighing was neces-

(a) 13 East, 522.

(b) 6 East, 614.

(c) 11 East, 210. See also *Zegury v. Furnell*, 2 Campb. N. P. C. 240.

(d) 13 East, 525.

sary to the delivery, nor was any allowance to be made, neither was there any uncertainty as to the precise thing to be delivered, but the delivery was symbolically executed as much as if the goods had been delivered into the party's own hands.

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*Park* and *Taddy* contra, admitted the rule to this extent, that if any thing remained to be done between vendor and vendee in order to complete the sale, the contract was still open; but they denied that such was the case here. And they rested their argument mainly on *Whitehouse v. Frost*, and the language of *Le Blanc J.* in that case (a), "that the objection only applies where something remains to be done as between the buyer and seller, or for the purpose of ascertaining either the quantity or price." Now here both price and quantity, as it is admitted, were ascertained by the contract; and nothing remained to be done as between the buyer and seller, although the wharfingers, before they could finally execute the order for delivery, were to ascertain it by weighing. Therefore, again in the words of *Le Blanc J.* in the same case, "though something remained to be done as between the vendee and the persons who retained the custody of the flax, before the vendee could be put into separate possession of the part sold, yet as between him and his vendors nothing remained to perfect the sale." The weighing was not an ingredient in the contract, but was rather like the weighing in *Hammond v. Anderson* (b) for the satisfaction of the buyer; whereas the case has been argued as if it were a sale not of an ascertained quantity, but of

(a) 12 East, 621.

(b) 1 N. R. 69.

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an unascertained number of mats to be ascertained by weighing. And *Jackson v. Anderson (a)*, as well as *Whitehouse v. Frost*, shews that an order for the transfer of part of an integral quantity will vest the property in that part, though it be intermixed with and not separated from the whole. The case of *Hanson v. Meyer* might have applied if the price here had been made to depend upon the weighing; and so perhaps might *Wallace v. Breeds* if the order for delivery there had been entered in the wharfingers' books, but at the time of the countermand nothing had been done upon the order.

Lord ELLENBOROUGH C. J. The question in this case is whether the property has been so ascertained as to be considered in law as effectually delivered, the order to deliver having been given to the wharfingers, and entered in their books. That would not of itself be sufficient unless the flax were in a deliverable state, and if farther acts were necessary to be done by the seller to make it so. Here it appears that farther acts were necessary; for the flax was to be weighed, and the portion of the entire bulk to be delivered was to be ascertained, and if the weight of any number of unbroken mats was insufficient to satisfy the quantity agreed upon, it would have been necessary to break open some mats in order to make up that quantity. Therefore it was impossible for the purchaser to say that any precise number of mats exclusively belonged to him. If the weight did not divide itself in an integral manner, it would be necessary to break up and take some fraction of another

(a) 4 Taunt. 24.

mat. Every component part therefore was uncertain: it was uncertain how many gross mats there would be, or what fraction of a broken mat; for, as it has been suggested, any certain number of mats might fall short of the entire precise quantity of ten tons. That is only one circumstance to shew that there was some uncertainty at the time of the contract, which was to be reduced to certainty by something to be done afterwards, that is, by weighing, in order to ascertain the entire quantity. If then some further acts were to be done in order to regulate the identity, and (if I may use such a phrase) the individuality of the thing to be delivered, I cannot say that it was in a state fit for immediate delivery, and that the order to deliver entered in the wharfingers' books operated as a complete delivery. I think this case falls within the authority of *Wallace v. Breeds*, and that the delivery was incomplete at the time of the countermand.

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LE BLANC J. The question is between the vendor and vendee. The difficulty arises from not keeping that correctly in view. The question is, whether every thing has been done as between them to complete the delivery; if not, the vendor had a right to countermand the delivery. The contract was for a specific quantity; the price was ascertained; the order for delivery had been sent to the wharfingers, and they had accepted and entered it in their books; and 14 days were allowed for the delivery, from which time the goods were to lie at the wharf at the charge of the vendee. But another thing was necessary to make this symbolical delivery equivalent to an actual delivery. It was to be ascertained what particular goods the

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vendee was to have. Now that is the point where the case is defective. The vendor had a much larger quantity, not lying together in one mass, but in packages, which it was necessary to divide before it could be ascertained what part was his and what was to belong to the purchaser. Ten tons out of the mass were to be delivered; and in order to do that it was necessary to ascertain how many mats or packages constituted the precise quantity of 10 tons, or what part of a mat or package; which was to be done by the weighing of the wharfinger, who was the agent for this purpose of both parties. It was the same therefore as if the weighing had been to be performed by the vendor and vendee, or in their presence. The fact that has not been done; and therefore the portion of the goods that was to belong to the vendee has not been ascertained as between them. This circumstance distinguishes the case from *Whitehouse v. Frost*, which has been most pressed in argument. In all the other cases where something remained to be done to ascertain either the price, or quantity, or what was to be delivered, a symbolical delivery has been held to supply the place of an actual delivery. In this case something was to be done not to ascertain the price or quantity, (though upon the quantity of mats and packages would depend what was to be the allowance for tare and draft, but I lay that out of the question,) yet something was to be done to ascertain the individuality. In *Whitehouse v. Frost* the owner of a large quantity of oil in the mass sold a certain quantity of it to B., who contracted to sell the same to C. specifically as an undivided quantity, and gave him an order upon the owner for the delivery, which order the owner accepted.

The question that arose was not between the owner and *B.*, but between *C.* and *B.*, who, as far as it was in his power, had done every act to complete the delivery, for he only pretended to sell an undivided quantity. Therefore whatever might have been the case as between the owner and *B.*, the Court were of opinion that as between the subvendee and *B.* the sale was complete, *B.* having done all that could be done, as between them, to make the delivery effectual. Here it appears that all had not been done by both parties to ascertain what was to be delivered, and until that was done, the symbolical delivery left the transaction incomplete.

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BAYLEY J. I am of the same opinion. In the case of *Whitehouse v. Frost* nothing remained to be done by the seller, and on that ground the decision of that case was founded. There the vendor sold an undivided 1-4th part of the quantity. The Court must have proceeded on the rule laid down in *Rugg v. Minett*, because that case had been recently decided, and they had it then before them. There the party bought a number of casks of turpentine, which were to be filled up by the vendor: all were filled up except ten, and the property of all those which were filled up was considered as having passed to the vendees; but as to the others, that it remained in the vendor; and the whole having been consumed by fire, that the ten casks continued at the vendor's risk, but not the rest; and the reason was, that as to those nothing remained to be done on the part of the vendor, but as to the ten casks something still remained to be done. Here also it remained with the vendor to have the weight of the ten tons ascertained,  
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and to say what specific mats were to be delivered. The purchaser had no right to point out the specific mats; the sellers only had that option. Therefore as something still remained to be done by the plaintiffs who were the sellers, and they had an option and election what mats they would set apart, they had a right to consider the contract as still incomplete, and to countermand the delivery.

DAMPIER J. Nothing remained to be done in order to ascertain the price or quantity, but it remained at the option of the sellers to ascertain what particular mats were to be delivered; and that was to be ascertained by them by weighing; which stood in the way of a complete delivery in fact, and hindered the symbolical delivery from being equivalent to an actual delivery. And unless there has been something equivalent to an actual delivery, the inclination of the Courts has been to hold the sale not complete.

Rule discharged.

Thursday,  
 Feb. 10th.

### The KING against SMITH.

An election of A. to a corporate office in place of a supposed vacancy created by B., cannot be referred to an existing vacancy created by C.

THE borough of *Wotton Basset* consists of a mayor, two aldermen, and twelve capital burgesses, out of whom the mayor and aldermen are chosen, and the capital burgesses are chosen by the mayor, aldermen, and capital burgesses. At a corporate meeting held on the 12th of February 1812, one *Starkey* made a pretended resignation of the office of capital burgess, and *Smith* was elected in his place, and sworn in.

*Starkey*

*Starkey* at the time of this resignation was an alderman, having been elected and sworn in as such at a former meeting, and had thereby vacated his office of capital burgess; and the number of capital burgesses was complete at the time of the meeting on the 12th of *February*. Under these circumstances a rule nisi was obtained for an information in nature of quo warranto against *Smith*, for exercising the office of capital burgess.

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*Pell Serjt.* and *Bayly*, shewed this for cause upon affidavit, that at the same meeting on the 12th of *February* one *Kibblewhite*, then a capital burgess, was elected and sworn in an alderman, and thereby vacated his office of capital burgess, and whilst such vacancy continued the defendant was elected and sworn in a capital burgess; but the affidavit did not state that he was elected to fill up such vacancy, nor did it deny that he was elected in the room of the vacancy supposed to be made by the pretended resignation of *Starkey*. And thereupon they made this point, whether there being an actual vacancy at the time of the defendant's election and swearing in, his title should not be referred to that vacancy which did exist, so as to make him a burgess de jure as well as de facto; although he was chosen upon a supposed vacancy which did not exist. And they contended that it should, though if it had appeared that this was a corporate meeting for the exclusive purpose of filling up the supposed vacancy of *Starkey*, they admitted it would have been different; but here the meeting was also for other purposes, and it was clear that they meant to elect the defendant, if there was a vacancy; and therefore it matters not by whom

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whom that vacancy was created; and it is the duty of all corporate bodies to provide forthwith that the body is full. But

*The Court* said that it was clear they elected *Smith* to fill up the supposed vacancy of *Starkey* and no other; and that being so, his election could not be referred to the vacancy of *Kibblewhite*; for it might have made a very material difference in the choice of the electors, if they had been aware that they were supplying any other vacancy than the supposed vacancy of *Starkey*. The same person who in their judgment might be fit to succeed him might not have been selected in place of the other. It might be thought material to preserve a proportion between corporators of different descriptions or influence in the corporate body, which would make a consideration of the vacancy very important in the choice of the successor.

*Per Curiam,*

Rule absolute,

*Abbott and Gifford* in support of the rule,

*Friday,*  
*Feb. 11th.*

CHAMBERLAIN, Administrator of ANN CHAMBERLAIN, deceased, *against* WILLIAMSON. (a)

An administrator cannot have an action for a breach of promise of marriage to the intestate, where no special damage is alleged.

ASSUMPSIT by the plaintiff as administrator, upon a breach of promise of marriage made to the intestate, laying the promise in the usual way; and the plaintiff avers that the intestate, confiding in the said promise, &c. remained sole and unmarried until her

(a) Cause was shewn against the rule at *Serjeants' Inn* before this term.

death,

death, and was ready, &c., and although she requested the defendant, &c., yet the defendant did not when requested, or at any time, marry her, but refused, &c. And there were several other counts varying the promise; but the declaration did not allege any special damage, but concluded to the damage of the plaintiff as administrator, &c. Plea, non-assumpsit.

At the trial before *Bayley J.*, at the last assizes for the county of *Gloucester*, the promise was proved, and it farther appeared that the intestate kept a boarding-school, which, it was agreed with the defendant, that she should relinquish at *Christmas 1812*, in order to be married. In the preceding *November*, however, the defendant broke off all farther intercourse, and soon afterwards the intestate's health began to decline, and she was compelled to quit her school, and died in the following *May*. The learned Judge doubted whether the action were maintainable, but assuming for the time that it was, he directed the jury to consider of the damages as if the action had been by the intestate herself, for that whatever compensation in money she would have been entitled to, by so much she would have died the richer. The jury found a verdict for the plaintiff, damages 200*l.*

In *Michaelmas* term a rule nisi was obtained for arresting the judgment, on the ground that this action was not maintainable by the personal representative; or for a new trial; on the ground of a misdirection. And upon the first point the stat. 4 *Ed. 3. c. 7. de bonis asportatis in vitâ testatoris*, and 31 *Ed. 3. c. 11.*, were cited, and also *Com. Dig., Administration, B. 13.*, "that by the equity of these statutes an executor or administrator shall have every action for a wrong done to  
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the *personal estate* of his testator," *Latch*. 168. But this, it was said, is not a wrong to *the personal estate*. And in *Mordant v. Thorold* (a) it was resolved that the administrator was not entitled to a *scire facias* upon a judgment in dower obtained by his intestate, where she died before the damages had been ascertained on a writ of inquiry, because the writ of inquiry being in the nature of a personal action for the damages, it dies with the person. And as to the misdirection, it was objected that the criterion of damages could not be the same as if the action had been by the intestate herself, by reason that she would have been entitled to damages for the loss of personal comfort, and advancement in life, and also for personal feelings; whereas the administrator could only be entitled in respect of the damage to or deterioration of her personal estate.

*Peake* (with *Dauncey*) now shewed cause, and in maintenance of the action he took this distinction, that the action was founded in contract, and wherever that is the case, the executor or administrator shall have it. Therefore in *Com. Dig. Administration*, B. 13., it is said "he shall have covenant, upon a covenant made to his testator for a personal thing. So upon a contract made to the testator," and for this *March pl.* 23. is cited; which case is as follows: "Justice Jones said, and so it was agreed by the Court, in what case soever there is a contract made to the testator, or intestate, or any thing which ariseth by contract, there an action will lie for the executor or administrator." And even upon a promise made to the intestate for the benefit of

(a) 1 *Salk*. 252. S. C. *Carth.* 133.

a stranger,

a stranger, it was adjudged in *Bafield v. Collard* (a) that the action would lie for the administrator. The rule, *actio personalis moritur cum personâ*, holds with respect to actions founded upon a tort or trespass: and this was the rule on which the resolution passed in *Mordant v. Thorold*, for it was said "that the damages were due to the intestate only by way of satisfaction for an injury which is in nature of a *trespass*." But here the damages were due to the intestate *ex contractu*, and therefore this action may well stand with the resolution in that case. And he said that there had been a case of this sort lately before *K. B. of Ireland*, in which the action had been held maintainable; but he mentioned neither name nor time. Upon the other point he maintained that the direction was correct, and enforced the propriety of the learned Judge's reasoning by putting this case, Suppose the intestate had recovered damages, and died immediately after their payment, would not her personal estate have been so much the better?

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*Jervis* and *Abbott* contra, after observing that this was an action of the first impression, denied that the rule of law was that an executor or administrator shall have such actions as are founded on a contract with their testator. The right of the executor or administrator depends not upon whether the action is founded in contract, but upon whether there has been an injury to the personal estate of the testator. Therefore in *Kingdon v. Nottle* (b), though the action was founded on a breach of covenant with the testator, yet was the

(a) *Aleyn*, 1. . (b) 1 *M. & S.* 355.

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executor held not entitled to have the action, because there was no damage to the personal estate; but in *Lucy v. Levington* (a), where there was a damage by reason of the breach of covenant, the action was held maintainable by the executor. And though in the Bishop of *Coventry and Lichfield's* case a quare impedit was held to lie by the executor for a disturbance to the testator, it appears from the fullest report of that case (b) that that was a grant of the advowson for 21 years, which was a chattel interest; and so it was said that the stat. 4 Ed. 3. meant not only a trespass and carrying away the goods, but also when the testator loseth his chattel by a tortious interference. And therefore as in *ejectione firmæ* upon an ouster of the testator (which is out of the words of the statute) his executors may recover the term and damages by the equity of the statute, so the disturbance of his presentation shall be taken within the same equity. And therefore these cases shew that it is to the substance and not the form of action that the Court looks, in order to see if it be maintainable by the executor; and that what *Jones J.* is reported to have said cannot be taken as an universal proposition. It may then be admitted, that by an equitable construction of the statute the executor or administrator shall now have the same actions for any injury to the personal estate of the testator in his lifetime, whereby it is become less beneficial to the executor, as the testator himself might have had, whatever the form of the action may be (c). Now that the breach of this promise is not an injury of the above description is evident, first, from the consideration that the perform-

(a) 2 Lev. 26. S.C. 1 Ventr. 175. (b) 3 And. 241. S.C. *Seville*, 118.

(c) 1 Saund. (Williams's edition) 216. n. 1. to *Wheatley v. Lane*.

ance of it would not have augmented the personal estate of the intestate, but on the contrary would have divested her of it, and vested it in the defendant; next, from the nature of the damages to be recovered, which are uncertain, not capable of being estimated precisely as a pecuniary loss, nor, in this instance, by reference to any diminution of property; for none such is alleged; but the whole sounds in damages in respect of the personal loss and inconvenience to the intestate, and is in a degree what the law terms vindictive. And the statute *Ed. 3.* does not extend to an injury of this sort done to the testator; in the same manner as it does not give any remedy to the executor or administrator, for assault and battery, slander, deceit, false imprisonment, and the like (*a*), which many times are greater personal injuries than the present. And suppose the intestate, instead of dying, had become bankrupt, her assignees could not have maintained any action upon this promise; and yet they are the assignees of the *estate* and effects of the bankrupt, and in general take all that an executor or administrator would take; or if she had recovered damages, and before judgment had become bankrupt, such damages would not, according to *Benson v. Flower* (*b*), have been assignable, by reason of their uncertainty; and *Mordant v. Thorold* was determined upon the same reason; and *Ex parte Charles* (*c*) decided that damages such as these were not sufficient to found a commission of bankruptcy, which shews that they are not a *debt*. Marriage indeed is regarded by the law as valuable, and the loss of it is a temporal loss to the party, for which an action will lie; but it is valuable

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(*a*) *Sir W. Jones*, 174.    (*b*) *Sir W. Jones*, 215.    (*c*) 14 *East*, 197.



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only as it regards the person and not the personal estate; more especially as it concerns a woman, for the reason before given. And the maxim, *actio personalis moritur cum personâ*, applies to all cases of personal wrongs, whether they arise *ex contractu* or *ex delicto*; because, as to the personal estate, the executor represents the person of his testator, but not as to his personal wrongs. It is true a case might be put, in which this action would be maintainable; as, if the intestate had actually suffered some pecuniary loss, or been damnified in her property by reason of this breach of contract; but all that is matter of special damage, and should have been stated as such, for otherwise the Court cannot intend it. And so in slander, where the words are not actionable in themselves, yet if special damage be alleged, the action will lie, but otherwise not; which may serve as an illustration. Upon the other point they did not add any thing material to the objection as it was presented upon moving for the rule.

Lord ELLENBOROUGH C. J. said it was a case of novelty, and importance in its principle, and that it had been ingeniously argued; the not finding any precedent for such an action made it very fit that the Court should pause, in order to look into the cases. And *Le Blanc J.* said that they could not but recollect that though the damages in actions of this sort were given strictly as a compensation, yet they were almost always considered by the jury somewhat in *pœnam*.

*Cur. adv. vult.*

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court in substance as follows:

This

This was a motion in arrest of judgment in an action brought by the plaintiff, as administrator, for a breach of promise of marriage made to the intestate by the defendant. The declaration did not contain any allegation of special damage; and the question was, whether the action is maintainable by the personal representative. The action is novel in its kind, and not any one instance was cited or suggested in the argument of its having been maintained, nor have we been able to discover any by our own researches and inquiries, and yet frequent occasions must have occurred for bringing such an action. This circumstance imports at least an opinion not very favourable to this species of action. However, that would not be a decisive ground of objection, if on reason and principle it could strictly be maintained. The general rule of law is, *actio personalis moritur cum personâ*; under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record; otherwise the Court cannot intend it. If this action be maintainable, then every action founded on an implied promise to a testator, where the damage subsists in the previous personal suffering of the testator, would be also maintainable by the executor or administrator. All injuries affecting the life or health of the deceased; all such as arise out of the unskillfulness of medical practitioners; the imprisonment of the party brought on by the negligence of his attorney; all these would

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be breaches of the implied promise by the persons employed to exhibit a proper portion of skill and attention. We are not aware, however, of any attempt on the part of the executor or administrator to maintain an action in any such case. Where the damage done to the personal estate can be stated on the record, that involves a different question. Although marriage may be regarded as a temporal advantage to the party as far as respects personal comfort, still it cannot be considered in this case as an increase of the individual transmissible personal estate, but would operate rather as an extinction of it; though that circumstance might have been compensated by other advantages. Loss of marriage may, under circumstances, occasion a strict pecuniary loss to a woman, but it does not necessarily do so; and unless it be expressly stated on the record by allegation the Court cannot intend it. On the ground, therefore, that the present allegation imports only a personal injury, to which the administrator is not by law, nor is he in fact shewn to be, privy, we are of opinion that, in the absence of any authorities, this administrator cannot maintain this action. The cases which were cited on the other side do not appear to have such an immediate bearing on the question as to require that they should be reviewed and commented on. We are of opinion that this judgment must be arrested, and of course the motion for a new trial is thereby disposed of.

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The KING *against* The Inhabitants of the  
Township of MORLEY.

Friday.  
Feb. 11th.

UPON appeal against an order of two justices, removing *W. Reddick* and his family from the township of *Armley* to the township of *Morley*, the court of quarter sessions confirmed the order, subject to the opinion of this court on the following case:

The pauper's father resided in *Armley* under a certificate from *Morley*, dated 1 June 1761, acknowledging him by name, his wife by name, and their three children, *Mary*, *Anne*, and *Alice*, to be legally settled in the township of *Morley*. The pauper when he was about 12 years old (his father being then lately dead, and he residing with his mother in *Armley* under the certificate, as part of his late father's family) was bound apprentice by the overseers of *Morley* to one *Lister* of *Morley*, till his age of 21. He served in *Morley* under the indentures 7 years, and then with his master's consent returned to *Armley*, where his mother and family then resided under the certificate, and still reside, to serve one *Gaunt* in *Armley*. The pauper continued in *Gaunt's* service till the expiration of his indentures. He then hired with *Gaunt* for a year, and served a year, and remained with *Gaunt* 4 years in the whole, living with him in *Armley* during all that time. Upon the pauper's going to *Armley* to serve out the remainder of his apprenticeship with *Gaunt*, he did not go to his mother's house, nor at any time, during the rest of his apprenticeship, resided at his mother's as part of her family.

The son of a certificated person, who was not named in the certificate, upon the death of his father, being then resident with his mother under the certificate, was bound apprentice in the certifying parish, left his father's family, and served in that parish under the indentures for some years, and then returned, with his master's consent, to serve a person in the certified parish, where his mother and family resided under the certificate, and served that person until the expiration of his indentures, at which time, being of the age of 21, his mother still residing in the parish, he hired himself to the same person for a year, and served that and three successive years, in the certified parish: Held that he gained a settlement by such hiring and service.

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This case first came before the Court in *Trinity* term last, and was in part argued, but on account of its being imperfectly stated was then, and at several subsequent times, adjourned, in order to be amended, and was finally argued on a former day in this term. The question made upon the amended case was this, whether the pauper gained a settlement in *Armley* by hiring and service with *Gaunt*.

*Topping* and *Scarlett* in support of the order of sessions contended that he did not. And they said it was clear that the pauper was originally within the description in the statute 9 & 10 W. 3. c. 11. of a person coming into the parish by the certificate; because though he was not specifically named in the certificate, the case states that he was residing under it when about 12 years old. Therefore unless the pauper was discharged from the certificate he could not gain a settlement in *Armley* by this hiring and service. And the reason is, because, he being under the certificate, the statutes 8 & 9 W. 3. c. 30. (certificate act) and 9 & 10 W. 3. c. 11. would prevent his gaining a settlement in the certified parish, except by two ways, neither of which is hiring and service. Now the only means by which he could be discharged from the certificate were either by gaining a settlement for himself, or by separating himself from his father's family in such a way as to be deemed no longer a part of it. That he did not gain a settlement for himself is clear; because neither the service under the indentures in the certifying parish, where he was already settled, nor in the parish certified, into which he returned under the certificate, could gain him one. Then did he separate himself from his father's family  
by

by this hiring and service so as to be deemed no longer a branch of it? And it seems from *Rex v. Keel* (a), *Rex v. Collingbourn Ducis* (b), and *Rex v. Ingworth* (c), that he did not; for this hiring and service in the certified parish after his return was not such a separation as to have the effect of completely disuniting him from his father's family, and thus discharging him from the certificate under which he returned. In all those cases the child, after his return under the certificate, hired himself away from his family, and yet it was resolved that he was not thereby emancipated; and though this case differs from those in this particular, that here the pauper was an adult when he hired himself, yet that seems only to be material where the child having up to that time lived under the paternal roof, actually quits it, which manifests by the child's own act that he means to abandon his family; and on that ground *Rex v. Roach* (d) was decided.

*Park* and *Reader*, contra, insisted, that the pauper not being named in the certificate, but being included in it merely as part of his father's family, continued under it only so long as he constituted a part of that family; and being emancipated, he was no longer restrained by the statute, but was competent to gain for himself, or to be the means of others gaining, a settlement in the certified parish by any of the modes by which settlements are gained. And in support of these propositions they relied on *Rex v. Heath* (e), and *Rex v. Mortlake* (f). And as to the emancipation, they said

(a) *Cald.* 144.(b) 4 *T. R.* 199.(c) 8 *T. R.* 339.(d) 6 *T. R.* 247.(e) 5 *T. R.* 583.(f) 6 *East*, 397.

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that *Rex v. Roach* (a) was an express authority to shew that if a child, after becoming an adult, sever himself from his father's family by entering into service, he is thereby emancipated; and Lord *Kenyon* there laid down a clear rule, which he said would reconcile all the cases. And the case of the soldier (b) proceeded upon the same principle. And as to the cases relied on e contra, the answer has been given to them by its being admitted that they all turned upon the child's being a minor; for although in *Rex v. Ingworth* it seems that he continued his service after he was 21, that circumstance escaped notice; and at all events it differs from the present in this, that when he first contracted he was under age,

*Cur. adv. vult.*

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court in substance as follows :

His Lordship (after having stated the case) said : On this case it is material to observe, first, that the pauper is not named in the certificate, but merely comprehended under it as part of his father's family; secondly, that after the time of quitting his father's family he never returned to his mother's house, but continued to serve under the indentures until the age of 21, and then hired himself for a year, and served for a year, and so continued in the service for four years successively with the same master. And the question is, whether, having so hired himself after the age of 21, he was in a capacity thereby to gain a settlement in *Armley*. The negative of this question has been contended for in support of the order of sessions, on the

(a) 6 T. R. 247.

(b) *Rex v. Walpole*, St. Peter's, Burr. S. C. 638.  
statute

statute 9 & 10 W. 3. c. 11., and on the authority of *Rex v. Collingbourn Ducis*, *Rex v. Keel*, and *Rex v. Ingworth*.

The words of the statute are "that no person whatsoever who shall *come into* any parish by certificate shall gain any settlement unless he shall take a lease of a tenement, &c., or execute some annual office, &c."

But I observed before upon the first circumstance of this case, which is never to be lost sight of, that the pauper is not named in the certificate, and therefore he is to be considered as *coming into* the parish by the certificate, only so long as he is a part of his father's family. And that brings it to the question, whether he was a part of his father's family. In the case of *Collingbourn Ducis* the pauper, after leaving his father's family, returned to the parish where his father was living under the certificate, being under age, and was hired in the certified parish, at which time he continued a part of his father's family. So, in *Rex v. Keel* the pauper returned to a branch of her family in the certified parish, and was there hired and served whilst under age. The case of *Rex v. Ingworth* is the nearest to the present case; but there is this distinction, that there the pauper returned under age to the father's house and hired himself whilst under age to a person in the same parish; and although by comparing his age when he first let himself, with the time when he last let himself, it does appear that he must have been of age at the commencement of the second year's service under the last letting, yet that circumstance seems to have escaped the notice both of the counsel and the Court; and the case was decided entirely on the authority of *Rex v. Keel*, which it was supposed exactly to resemble; but which, for the above reason, is not so.

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We do not think, however, that that is an authority to warrant us in deciding that where a child, not named in the certificate, separates himself from his father's family at an age when he is by law capable of supporting himself, he shall either derive a settlement acquired subsequently by his father, or shall be prevented by the certificate from gaining a settlement for himself; which is a disability that can only attach on him as being one of the family. This is illustrated by *Rex v. Roach*, where a daughter, being of age, left her father's family, and hired herself to a farmer for eight weeks; during the time of her absence her father acquired a subsequent settlement, and it was determined that she was not entitled to such subsequent settlement, on the ground that she had ceased to be a part of the father's family, or, in the language of the cases, was emancipated. That case was fully argued and considered, and it lays down a rule in precise terms, which may serve to govern others in future. The same point was determined in *Rex v. Cowhoneybourne*, 10 East, 89. That was a case where the daughter, being under age, went to reside with her uncle, with her father's consent, and was maintained wholly by him, and continued with him till she was of the age of 27; and the Court held that she ceased on her coming of age to be a part of her father's family, although she had not acquired any distinct settlement for herself; and therefore the father acquired a settlement by hiring and service, as an unmarried man, not having a child within the words of the statute. It is true that these latter were cases where the question did not arise upon a certificate; but they establish a principle which shews what it is that constitutes a child a part of his father's family; and

whatever divests him of the capacity as one of his father's family in the one case, divests him of the incapacity in the other. We are of opinion, therefore, that the pauper ceased to be a part of his father's family, and by the hiring and service gained a settlement in *Armley*.

Orders quashed.

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W. PARKER and Others, Assignees of S. PARKER, a Bankrupt, *against* BEASLEY and WALTER BELL, (Survivors, together with JOHN BELL, of WILLIAM BELL, deceased, which said JOHN BELL is outlawed.) *Friday, Feb. 11th.*

**I**NDEBITATUS assumpsit for premiums of insurance. Plea, general issue, with a notice of set-off for money due from the bankrupt to the defendants, for losses upon policies underwritten by the bankrupt as an assurer to the defendants.

At the trial before Lord *Ellenborough* C. J. at the sittings after last term, the doubt which arose was, whether the defendants were entitled to set off the losses upon two policies of assurance; as to which it appeared, by the admissions, that the defendants, together with *Wm. and J. Bell*, trading under the firm of *William and John Bell and Company*, effected the two policies *in the name of their firm*, with *S. Parker*, who underwrote the same before his bankruptcy. One of the policies was on goods on board the ship *Georgia Planter*, and the other on goods on board the ship *Rodney*. A cargo of goods was shipped on board both the said ships at *Norfolk in Virginia*.

Where brokers effected policies of assurance on goods on account of their principals, but in their own names, and accepted bills drawn on them on account of the goods, which were consigned to them, and lost before arrival: Held that they might set off such losses in an action brought by the assignees of the underwriter, (since a bankrupt) for premiums, although they had not any commission del credere, and the losses were not adjusted.

*J. Bell*

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*J. Bell* being then resident in *Virginia*. *J. Bell*, and several other persons resident in *America*, were proprietors in different proportions of the two cargoes; and the two policies were effected by the house of *Bell* and Co. in pursuance of orders to that effect received from *J. Bell*, on behalf of himself and the other proprietors; and the cargoes were consigned to the house of *Bell* and Co., for the purpose either of being sold by them in this country, or of being forwarded by them to such foreign ports as they might judge expedient for procuring a market; and *Bell* and Co. were to account individually to the different proprietors in *America* for the proceeds of the goods severally shipped by each. The two ships with their cargoes sailed from *Norfolk*, with instructions to proceed to *Falmouth*, and there receive the orders of *Bell* and Co. as to their farther destination, and in the course of their voyage were captured, and a total loss was thereby sustained upon each of the policies, before *Parker* became a bankrupt; but those losses were never adjusted or allowed by him. *Bell* and Co., as the brokers or agents of the consignors, entered into contracts for the sale of both the cargoes, but at the sellers' risk until arrival, and the completion of those contracts was defeated by the capture. All the several proprietors of the said cargoes, except one, were at the time of the loss, and most of them are still indebted to *Bell* and Co., more or less, in respect of bills of exchange drawn upon *Bell* and Co., as well on account of the said cargoes as of other shipments previously made and consigned to the house of *Bell* and Co., but none of those proprietors are insolvent. *Bell* and Co. did not act for the consignors under a commission *del credere*, nor were they per-

personally interested in the insurances further than as above stated. If the defendants were not entitled to set off the losses upon the above policies, then the plaintiffs would be entitled to a balance of 88*g*l. for premiums of various policies effected by the defendants, in their partnership name, as brokers; subject to which question the plaintiffs were nonsuited, with leave to move to enter the verdict for that sum.

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 PARKER  
*against*  
 BEASLEY.

*Park* accordingly obtained a rule nisi on a former day in this term, and he distinguished this case from those policies in *Koster v. Eason* (a), which were effected by the brokers in their own names, on account of other persons, and on which they were held entitled to a set-off, in this particular, that there the brokers acted under a commission del credere, here they did not.

*Marryat* shewed cause, and contended that although the defendants had not any del credere commission, they had that which was equivalent to entitle them to a set-off, viz. a lien upon the policies in respect of the bills drawn upon them on account of these cargoes. And if the goods had arrived they would also have had a lien on them to the amount of such bills, which, according to *Wolff v. Horncastle* (b), was an insurable interest.

*Park* and *Parnther*, contra, referred to *Grove v. Du-bois* (c), and *Parker v. Smith* (d), as shewing that the sole distinction on which the decisions turned was,

(a) *Ante*, 112.(b) 1 *Boi. & Pull*, 316.(c) 1 *T. R.*, 112.(d) 16 *East*, 382.

whether

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*against*  
**BEASLEY.**

whether or not there was a del credere commission; and they further contended that without some contract between the underwriter and the broker there could not be mutual credit between them; and that the broker could not create to himself an interest to the prejudice of the underwriter by something which passed between the broker and his principals.

Lord ELLENBOROUGH C. J. In *Koster v. Eason* the Court said, as to those policies effected in the name of the brokers, on account of other persons, that the brokers could maintain an action in their own names, if they had a lien upon the policies; and by subscribing to policies in their own names, the underwriter had consented that they should be at liberty to stand in the character and situation of principals, that in case of loss they should be entitled to act in all respects as his creditors. That part of the case, therefore, was put upon the lien. Here, if the parties had not had a lien, their names would have stood in the policy as mere naked names not coupled with an interest; but they may have an interest not only by a del credere commission, but also by a lien. The acceptance of the bills on the credit of the consignment gave them an interest and lien; and having a right to retain the policies, and the policies being in their own names, and the contract of the underwriter originally with them, they might have brought an action in their own names; and the Court would not have staid the proceedings, unless the principals had indemnified them against the bills, in which case the Court would have suffered the action to go on for their benefit. Although they might not be interested in the goods originally, yet a subsequent interest may accrue by lien.

LE BLANC

LE BLANC J. The case of *Koster v. Eason* established this, that where the broker himself is a party to the contract so as to enable him to maintain an action in his own name, if he has acquired an interest, by a del credere commission he is entitled to a set-off. It is the same thing if he acquires an interest by advancing on the credit of the consignment.

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against  
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BAYLEY J. There is an express contract between the underwriter and these defendants, for the policies are in their names; and by suffering their names to be inserted in the policies, the underwriter has agreed that they shall be considered as principals, if they have an interest; and they have an interest by making the advances.

*Per Curiam,*

Rule discharged.

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Saturday,  
Feb. 12th.

### RICHARD BLAKE'S Case.

The Court granted a rule nisi for a habeas corpus on behalf of an officer under military arrest for charges of misconduct, on an affidavit complaining that he had not been brought to trial pursuant to the 23d article of war, as soon as a court martial could be conveniently assembled; but it being stated, upon the affidavit of the Judge Advocate General, in answer, that proceedings were instituted as soon as could conveniently be, and according to the course of office, and that the trial had been postponed partly on account of the absence of the prisoner's witnesses, the Court discharged the rule.

**T**OPPING moved on a former day for a habeas corpus, to the commanding officer of the infantry barracks at *Windsor*, on behalf of *Richard Blake* a lieutenant in the 53d regiment. The affidavit on which he moved stated that *Blake* being on leave of absence, and hearing that there were charges of alleged misconduct against him, and that he was charged as a deserter, voluntarily surrendered himself to take his trial, and on the 21st of *September* last was placed under arrest and committed to close confinement, in which he had continued to the present time, and until the latter end of *October* was not permitted to quit his room; but afterwards, upon a representation that his health suffered in consequence, was allowed to take necessary exercise. On the 1st of *November*, not having been furnished with any copy of the charges against him, he presented a memorial to the commander in chief for relief, but did not receive any answer thereto. On the 16th he was officially informed that a warrant had been signed for holding a court martial, and was furnished with a copy of the charges which consisted among others, of certain offences stated to have been committed at *Windsor* towards an officer of the same regiment. On the 22d the 55th regiment received orders to go on foreign service, and left the barracks on the following day, and embarked and sailed for *Holland*. The affidavit then stated that all or many of the witnesses who might be called in support of the

prosecution, and would be necessary for his defence had sailed with the regiment, and that the laws of this realm would not permit him to be sent to a foreign country for trial, and therefore he could not be brought to trial till the return of the regiment. It then set forth that by the 23d article of war, sect. 16. it is declared "that no officer, or soldier, who shall be put in arrest or imprisonment, shall continue in his confinement more than eight days, or until such time as a court martial can be conveniently assembled;" that from the vicinity of *Windsor* to head-quarters at the war office, and to several barracks where troops were stationed till within the last fortnight, a sufficient number of officers might at any time have been speedily and conveniently assembled for the purpose of constituting a court martial, and therefore there had been ample opportunity for conveniently assembling one, between the time of *Blake's* first commitment, and the signing the warrant, and also between the signing of the warrant and the regiment's sailing.

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*The Court* inquired if there was any instance of a habeas corpus to take a military subject out of military arrest, and were referred by the officer of the crown office to a case of *Humphrey Wade* (a) where a rule nisi had

(a) Jan. 28th, 1784. Motion by Mr. *Wilson* for a habeas corpus to Gen. *John Bell* to bring up *Humphrey Wade*, a serjeant of marines, on affidavit that he absented himself, the 14th of *June* last, from his regiment; soon after surrendered to a justice of the peace; the 4th of *July* thrown into a dungeon; kept hand-cuffed; denied pen, ink, and paper; carried to the hospital; as soon as recovered, imprisoned in the guard-room; where he has been ever since, except once again being



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had been granted; and *Topping* mentioned the case of *Grant v. Gould* (a), to shew that the Court had the power of examining the merits of military proceedings: but *Dampier J.* said he hesitated about granting a rule nisi, because upon the question whether a court martial could be conveniently assembled, if the return should be general that a court martial could not conveniently be assembled, the Court would be concluded, and he conceived the truth of such return could hardly be entered into upon an action for a false return. And *Le Blanc J.* assented to that. But the Court granted a rule nisi, The Attorney-General consenting on behalf of the commanding officer, to accept service on the solicitors for the treasury to shew cause on the morrow.

And now the rule coming on, he produced an affidavit from the Judge Advocate-General, which stated that directions were given, and proceedings instituted for bringing *Blake* to trial, as soon after his being put

in the hospital; asking for a copy of the charge against him, handcuffs were again put on; applied for a court martial; refused, though several have been held. By one of the articles of war a prisoner must be tried by a court martial within eight days, or as soon after as a court martial can be held.

LORD MANSFIELD C. J. Take a rule to shew cause on Gen. *Bell* why he should not be discharged. If they have proceeded according to martial law, we cannot interfere.

Rule nisi.

The affidavits upon which this rule was granted are in court. It does not appear what farther was done upon it; but a subpoena appears to have issued from the crown office to bring witnesses to testify on behalf of *Wade* at the next assizes for the county of *Devon*.

(a) 1 H. Blac. 69.

under arrest as could conveniently, and according to the usual course of office, and the nature of the case, be done; and that he believed *Blake* would have been brought to trial before the present time, had it not been postponed, partly on account of the absence in the *West Indies* of persons alleged by *Blake* to be material for his defence, and partly on account of the embarkation of the 55th regiment, which was still engaged on foreign service.

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Case.

*Topping* and *Birch*, contra, admitted that if the Court were satisfied that a reasonable time for proceeding to a court martial had not elapsed before the 16th of *November*, when the first official notice was given to the prisoner, they could not contend after the affidavit in answer, especially that part of it which respected the postponement of the trial on account of the absence of the prisoner's witnesses, that there had been any unnecessary delay since that time. And they referred to *Rex v. Suddis* (a), as another authority to shew that the Court did interfere in these matters by habeas corpus.

LORD ELLENBOROUGH C.J. Up to the 16th of *November* he seems to have thought it a fair time, and the delay since has been satisfactorily explained; it is not a wanton or oppressive delay, but arising out of the circumstances of the country. We cannot lay down any general rule, but must, in a very great degree, give credence to persons in high situations, when they depose that all has been done which could con-

<sup>1</sup> *East*, 306.

veniently

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done, unless something be shewn to the contrary.

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BAYLEY J. The prisoner did not present any memorial until the 1st of *November*.

*Per Curiam,*

Rule discharged.

END OF HILARY TERM.

# C A S E S

ARGUED AND DETERMINED

1814.

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IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Fifty-fourth Year of the Reign of GEORGE III.

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## MEMORANDA.

IN the last vacation Sir *Vicary Gibbs*, Knt., Lord Chief Baron of the Court of Exchequer, was appointed Lord Chief Justice of the Court of Common Pleas, in the place of Sir *James Mansfield*, Knt., who resigned:

Sir *Alexander Thomson*, Knt., one of the Barons of the Court of Exchequer, was appointed Lord Chief Baron.

*Richard Richards*, Esq. was appointed one of the Barons of the Court of Exchequer, in the place of Sir *A. Thomson*, Knt., and was knighted.

Sir *William Garrow*, Knt., His Majesty's Attorney-General, was appointed Chief Justice of *Chester*, in the place of Sir *R. Richards*, Knt.

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*Thursday,  
April 28th.*RAMSBOTTOM and Others *against* TUNBRIDGE.

A written paper, delivered by the auctioneer to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, but not signed by the auctioneer or any of the parties, was held not to be such a minute of the agreement as was required to be stamped, pursuant to stat. 48 G. 3. c. 149, nor such a writing as would exclude parol evidence. Lease dated two days before release good to support release which refers to a lease as of the day next before the date of release.

**A**SSUMPSIT for use and occupation. At the trial before Thomson C. B. at the last assizes for Kent, the case was this: the plaintiffs derived title by lease and release from one *Hawkins*, who let the premises by auction to the defendant at 16*l.* per Annum. The auctioneer who proved the letting stated upon cross examination, that when the lot was knocked down he handed over to the defendant a written paper in these words; "One piece of land called the back field adjoining, &c. containing three acres more or less for a term of ten years at 16*l.* per Annum to Mr. *W. Tunbridge*." This paper was unstamped; and thereupon it was objected that it could not be received in evidence; neither could any parol evidence of the rent be received, as it appeared that the contract had been reduced into writing. Objection was also made to the lease and release under which the plaintiffs claimed, viz. that the release was dated the 16th *April* and purported to be made to the plaintiffs as being in possession by virtue of a lease for a year bearing date the day next before the date of the release, whereas the lease was dated the 14th of *April*; and therefore it was said that there was not any lease to support the release. The learned Judge overruled both objections and the plaintiffs recovered; and now *Onslow* Serjt. renewed his objections upon a motion for a new trial. And upon the first in order to shew that a stamp was necessary, he referred to 48 G. 3. c. 149. sched. part 1. tit. Agreement,

ment, which imposes a duty "on any agreement or minute or memorandum of any agreement, whether the same shall be only evidence of a contract, or obligatory on the parties from its being a written instrument." And he argued that this written paper amounted at the least to evidence of a contract; and according to *Brewer v. Palmer* (a) its production could not be dispensed with.

1814.

RAMSBOTTOM  
against  
TURNER.

But the Court after inquiring whether the paper was signed by any of the parties, and being answered in the negative, refused the rule on both points, Lord *Ellenborough* C. J. saying that the paper was perfectly collateral to the taking, and was no more than if the auctioneer had told the defendant on what terms he was to hold, and was not like an original minute.

BAYLEY J. added that it seemed clear that the agreement in *Brewer v. Palmer*, which it was held necessary to produce, must have been signed by the parties; and upon the other point, that there appeared to have been a lease at the date of the release, which would give the lessees the possession.

Rule refused.

(a) 3 *Esp. N.P.C.* 213.

1814.

Friday,  
April 29th.DITCHAM *against* BOND.

A count for beating the plaintiff's servant per quod servitium amisit m.v. be joined with counts in trespass.

THE plaintiff declared in the first count for breaking and entering his dwelling-house; in the two next for assaulting and beating him; and in the last for beating his servant per quod servitium amisit. Plea, not guilty.

A general verdict for the plaintiff upon the whole declaration having been found at the *London* sittings with 5*l.* damages, it was moved by *Campbell* in arrest of judgment that here was a misjoinder of action, the last count being in case, and the others in trespass. And he argued that the actions for beating the plaintiff's servant, or for seducing his daughter, or for adultery with his wife, per quod consortium or servitium amisit, all stood on the same ground, and had been treated by this Court as actions upon the case; in support of which he cited *Cooke v. Sayer* (a), *Bennett v. Allcott* per *Buller J.* (b), *Macfadzen v. Olivant* (c) and *Parker v. Ironfield* (d), in the latter of which, being an action for assaulting and seducing the plaintiff's daughter, *Buller J.* had written on the back of his paper book, that it was an action on the case and not of trespass. He admitted however that this had been considered otherwise in *Woodward v. Walton*. (e)

LORD ELLENBOROUGH C. J. In the opinion of those who formed the register, and in *Townshend's* and *Corn-*

(a) *Bull. N. P.* 28. 3 *Wils.* 332. 6 *East*, 388. (b) 2 *T. R.* 167.  
(c) 6 *East*, 387. (d) *Ibid.* 391. (e) 2 *New Rep.* 476.

*Wall's* tables this action has been treated as an action of trespass; and the Court of Common Pleas in *Woodward v. Walton* (a), which is the last decision, have also treated it as such. For some purposes indeed we have considered it as case, but for general purposes we will leave it where the ancient forms and the most recent decision have placed it. We restore the old practice and adopt the last case.

1814.

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DITCHAM  
against  
BOND.

BAYLEY J. In the register and many books of entries trespass and a count for beating his servant per quod servitium amisit are joined. And in *Guy v. Livesey* (b) trespass for assault and battery on the plaintiff, nec non for assault and battery on the wife per quod consort. amis. was holden to be well brought.

DAMPIER J. In *Woodward v. Walton* the Chief Justice observed that in actions by a master for an assault upon his servant per quod servit. amis. there is no trespass against the plaintiff, yet this has been considered as an action of trespass; and in *Fitz. Nat. Brev.* it is treated as trespass: and he added that the opinion of Buller J. in 2 *T. R.* 167. seemed to have been founded on a mistake. And it appears from the concluding part of his judgment in *Woodward v. Walton* that he was well enough inclined to have arrested the judgment, if consistently with law he could have done it.

*Per Curiam,*

Rule refused.

(a) 2 *New R.* 476.

(b) *Cro. Jac.* 501.



1814.

Saturday,  
April 30th.

### HARTOP *against* JUCKES.

The solicitor under a commission of bankruptcy is not liable in the first instance to the messenger, whom he nominates, for his bill of fees, but if the solicitor agree with the petitioning creditor to work a commission for a sum certain, and receive a great part of that sum, he will be liable to such messenger,

**A**CTION for work and labour done by the plaintiff, as a messenger under certain commissions of bankruptcy, for the defendant at his instance and request, and also for money had and received, and upon the other money counts. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last term, the plaintiff claimed 7*l.* 16*s.* 2*d.* for his bill of fees, &c. as messenger under a commission against one *Clarkson*, and 14*l.* 1*s.* 10*d.* for a similar bill under a commission against one *Bartley*. The jury found a verdict for the former sum only; as to which it appeared that the defendant was employed by the petitioning creditor, as solicitor, to work the commission for a sum certain agreed to be paid him by the petitioning creditor, a great part of which sum the defendant had received from him. The defendant was also solicitor to the other commission, but there was no such agreement existing as to that. The plaintiff was nominated by the defendant, and appointed by the commissioners, messenger to both these commissions, and his bills were afterwards carried before the commissioners, together with the solicitor's bills of costs, and were allowed by them. Neither of the commissions had been superseded.

*The Attorney-General* moved to increase the verdict by adding 14*l.* 1*s.* 10*d.*, the amount of the bill of fees in *Bartley's* commission, and he referred to *Ex parte Hartop* (a) for the opinion of the Lord Chancellor, that

(a) 12 *Ves.* 349.

the solicitor is liable in general to the messenger. And the solicitor is the person usually applying to the messenger, who has no means himself of knowing any thing of the petitioning creditor; and suppose the commission does not proceed, to whom can he look but the solicitor; and if it does, the solicitor will be entitled to reimbursement out of the first funds.

But *The Court* were of opinion that the solicitor was not to be regarded in general as a principal, that the messenger is aware that he is not a principal, and upon the opening of the commission may ascertain who is the petitioning creditor, and though the solicitor is the medium through which it is convenient to the messenger to receive his bill of fees, that will not make him a principal.

Rule refused.

*G. Marriott* then moved to enter a nonsuit, contending on the authority of a case *Ex parte Dillon* (a) before Lord *Redesdale*, that costs awarded in bankruptcy could not be made the subject of an action at law. His Lordship said in that case that he would not suffer it, and that the special undertaking by the assignees to pay them made no difference.

But *The Court* said, that this was different from the case cited, not being an action for the costs, and that the receipt of the money for the business of working the commission, in which was included the business of the messenger, made the solicitor liable upon the count for money had and received. And Lord *Ellenborough* C. J.

(a) 2 *Scholes & Lef.* 110. S. C. *Cooke's Bank. Laws*, 642, 6th edit.

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HARTOP  
against  
JUCKES.

seemed not inclined to accede to what fell from Lord *Redesdale* in the case cited in its full extent, but said that he should have thought otherwise, where the party makes a special agreement.

Rule refused.

Saturday,  
April 30th.

ARUNDELL *against* Viscount FALMOUTH.

A lord of the manor was held entitled to an allotment under an inclosure act, in respect of his demesnes of the manor, over and above the allotment awarded to him by the act in respect of his right as lord of the manor.

ISSUE to try whether under the 51 G. 3. c. 100. (local and personal) (a) for inclosing lands in the parish of *Woolhampton*, &c. the defendant was entitled in respect of a farm called *Brimpton* farm, to an allotment, over and above such allotments as he might be entitled to, in respect of depasturing three particular head of cattle upon *Brimpton* marshes and *Wymore* common, and in respect of his right, as lord of the manors of *Brimpton* and *Shalford*, or either of them, to the soil of the said marshes and common respectively.

(a) By the 21st section it is enacted, that the commissioners shall allot unto Viscount *Falmouth*, as lord of the said manors of *B.* and *S.*, one full 16th part in value (the whole into 16 equal parts to be divided) of the common, heath, and waste grounds within and parcel of the said manors respectively, and such part or parts of the common marsh lands in *Brimpton*, not exceeding 1-20th part thereof, as in the judgment of the commissioners should be in compensation for and in full satisfaction of his right, as lord of the said manors respectively, to the soil of the said common and marsh lands respectively.

By sect. 29. (after the several allotments before directed shall have been made) then the commissioners shall allot the remainder of the commons, open and common fields, common meadows, common pastures, common marshes, heaths, and other commonable lands and waste grounds among the several proprietors thereof and persons interested therein, in such quantities, parts, shares, and proportions, as the commissioners shall determine to be a full and just compensation, equivalent, and satisfaction for their several and respective lands and grounds, rights of common, and other rights and interests therein.

2dly, Whether the defendant was entitled, under the act, in right of *Brimpton* farm in respect of the depasturing cattle upon the said marshes and common, over and above such allotments as he might be entitled to, in respect of his right, as lord of the said manors respectively, or either of them, to the soil of the said marshes and common.

Upon evidence at the trial before *Graham* B. at the last assizes for *Berks*, it was proved that *Brimpton* farm, containing about 273 acres, formed part of the demesnes of the manor of *Brimpton*, and that there had been an uninterrupted usage, for a long series of years, for the occupiers of that farm to turn out the cattle, which had wintered there, on the marshes. There was no evidence to oppose this but some presentments by the homage restricting the right to the three head of cattle mentioned in the first issue, but these presentments had never been acted upon. The jury found a verdict for the defendant.

*Jervis* moved for a new trial, on the ground that notwithstanding upon the finding by the jury it must be taken that there was a right of common attached to *Brimpton Farm*, still, it being parcel of the demesnes of the manor, the lord was not entitled to an allotment in respect of it, he being already compensated, by a specific allotment awarded to him by the act, in respect of his rights as lord of the manor. But

*The Court* refused the rule; Lord *Ellenborough* C. J. saying it would be hard to exclude the lord, who, in some cases, might be the principal landed proprietor in the parish, from compensation in proportion to his interest,

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 ARUNDELL  
 against  
 Ld. FALMOUTH.

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against  
Ld. FALMOUTH.

terest, because the act awarded him one-sixteenth in respect of his right as lord. If such was to be the effect of that clause, the lord would never consent to an inclosure; for then supposing him to be proprietor of 1000 acres, and that there was but one other proprietor of an 100, the lord must take 1-16th, and the other the residue. But it has always been understood upon these inclosures, that the lord is to be compensated for his demesne. Under this act the whole question turns on the meaning of the words in s. 29., which direct the remainder of the commons to be allotted among *the several persons interested therein*. In a liberal sense of these words the lord is interested in a twofold way: 1st, as lord of the soil; and 2dly, in respect of that estate, which in the hands of another person would be entitled to a right of common. And although the lord, being owner of the soil of the waste, cannot in strictness claim a right of common over it in respect of his demesnes, inasmuch as during the unity there would be a merger of that right; yet he has such an interest in respect of his estate as the commissioners may well contemplate, and under the words of this act may lawfully assign him a compensation for it.

LE BLANC J. The jury have found the fact on the evidence, that the lord was entitled to this right; and the only remaining question, whether he is entitled to a compensation in lieu thereof, is a question of law arising on the construction of the act of parliament. The 29th section does not, as many of these clauses do, enact that the residue shall be divided among the *other* proprietors, but that it shall be divided among the *several* proprietors and persons interested therein; and farther, that

that it shall be in such proportions as the commissioners shall determine to be a full compensation for their lands, rights of common, and *other rights*. Under this clause therefore can we say that the lord is excluded; and if not excluded, he must have an allotment in lieu of his rights.

1814.

ARUNDELL  
against  
Ld. PALMOUTH

BAYLEY J. The jury have properly found the fact; for the presentments were entitled to no weight. They were in their origin decidedly for the interest of those who made them, and were made against the rights of a person who was not entitled to be heard; and they are not followed up by any act.

DAMPIER J. The 21st section only gives the lord a compensation for his right to the soil of the common and marsh lands; but the lord had also a right to stock from his demesne lands, and the 29th section directs the residue to be allotted among the persons interested therein. Here the lord has an interest in respect of the demesne; for he has a right to turn his cattle on the common in respect of that land, as any other commoner may, observing not to overstock. There are no words of exclusion such as *other proprietors*; and he is one of the proprietors.

Rule refused.

1814.

Saturday,  
April 30th.

MORAVIA and Another *against* D. HUNTER and  
J. W. GLASS.

In assumpsit against two, where one pleads *non assumpsit* and a plea of bankruptcy, and the plaintiff enters a *nolle prosequi* as to him, as to the several matters pleaded by him, and the other defendant pleads *non assumpsit*, the latter is not discharged by the *nolle prosequi*.

**I**NDEBITATUS assumpsit against the defendants and one *A. Hunter*, and one *R. Rainey*, (which said *A. H.* and *R. R.* have been outlawed). *D. Hunter* pleads, 1st, *non assumpsit*; 2dly, a special plea of bankruptcy under 49 G. 3. c. 121.; 3dly, a general plea of bankruptcy. *Glass* pleads *non assumpsit*. The plaintiffs entered a *nolle pros.* as to *D. Hunter* as follows: "And the plaintiffs, inasmuch as they cannot deny the several matters above pleaded by the said *D.*, freely here in court confess that they will not further prosecute their suit against him the said *D.*" And now, a verdict having been found against *Glass*, and judgment thereon, it was moved by *Campbell* in arrest of judgment that the plaintiffs, by having entered a *nolle prosequi* as to *Hunter* upon the several matters pleaded by him, had confessed the *non assumpsit* as well as the other pleas, and therefore the other defendant *Glass* was also discharged. And in *Noke v. Ingham* (a), where upon a plea of bankruptcy by one of two defendants, and a *nolle prosequi* as to him, and judgment against the other defendant, and such judgment was held well, that was not like the present case where there is a plea of *non assumpsit*; and therefore *Denison J.* in that case took the distinction, that the plea of the bankrupt was not a plea to the action, but only a personal discharge, but that if one defendant was to plead a plea that was to go

(a) 1 *Wils.* 89.

to the action of the writ, he thought it might then have a different consideration.

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MORAVIA  
against  
GLASS.

But *the Court* held that the *nolle prosequi* was in effect only a confession, that as far as regards *Hunter* he had a defence on the matters pleaded by him.

Rule refused.

RAMSBOTTOM *against* MORTLEY.

Saturday,  
April 30th.

THIS was a similar case in all respects with that of *Ramsbottom v. Tunbridge*, ante 434., with this difference, that the written paper handed over by the auctioneer to the defendant *was signed by the auctioneer*, and *Thomson C. B.* ruled that it ought to be stamped, and thereupon directed a nonsuit.

A written paper, signed by the auctioneer, and delivered to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they are let to the bidder, and the rent payable, must be stamped pursuant to stat. 48 G. 3. c. 149.

*Best Serjt.* applied to set aside the nonsuit on the ground that this was neither a contract nor evidence of a contract, inasmuch as the name of one of the contracting parties, the lessor, was wanting to it. And he cited *Champion v. Plummer. (a)*

LORD ELLENBOROUGH C. J. It may not be evidence of the whole contract, but it is evidence of a material part. If a necessary part in the proof of the contract, I think that it ought to be stamped.

DAMPIER J. This may not be such a memorandum of the contract as would satisfy the statute of frauds, but

(a) 1 N. R. 252.

it



1814.

RAMSBOTTOM  
against  
MORTLEY.

it is such a memorandum of the agreement as requires a stamp. It is not evidence of the entire contract, but is a memorandum signed by the agent of one of the parties, and surely that is evidence of the contract. In the case decided the other day the paper was not signed by any one.

*Per Curiam,*

Rule refused.

*Saturday,*  
*April 30th.*

DOE, on the Demise of ESDAILE and Others,  
against MITCHELL and Another.

The bargain and sale by the commissioners to the assignees of a bankrupt of the bankrupt's freehold lands, does not relate to the act of bankruptcy so as to vest the title in the assignees from that time, and, therefore, in ejectment by the assignees upon a demise laid, after the act of bankruptcy but before the bargain and sale, adjudged ill.

EJECTMENT tried before *Thomson C. B.* at the last assizes for *Surrey*, for certain freehold lands of one *B. J. Mitchell*, a bankrupt, of whom the lessors of the plaintiff were the assignees, and the demise was laid after the date of the commission, but before the general assignment, and also before the bargain and sale of the lands in question by the commissioners to the assignees. And upon exception taken that the demise was insufficient, the learned Judge directed a nonsuit.

And now *Larves* moved for a new trial on the ground that the bargain and sale when executed shall relate to the act of bankruptcy, and so the demise which was after the commission, and of course after the act of bankruptcy, was well enough. And he said, that the case of *Perry v. Bowes* (a), on which the learned Judge formed his opinion at the trial, did not sustain the objection to which he then yielded, because that case

(a) *T. Jones*, 196. S. C. 1 *Ventr.* 360. See also *Ellist v. Denby*, 12 *Mod.* 3.

turned,

turned, not upon the relation of the bargain and sale to the act of bankruptcy, but on the relation of the inrolment to the bargain and sale, which inrolment being expressly enjoined by the stat. 13 *Eliz.*, of bankrupts, was held not to enure by relation like the common case of bargain and sale inrolled under the stat. *H. 8.* of inrolments. But in this case, after the execution of the bargain and sale, in the same manner as after an assignment by the commissioners of the bankrupt's goods (*a*), the assignees were in by relation to the act of bankruptcy; and so it was argued and not denied in *Doe v. Telling* (*b*); but that being the case of an insolvent debtor where the act of parliament vests his estate in the clerk of the peace until conveyance, the doctrine was held not to apply.

1814.

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*Doe*  
*against*  
MITCHELL.

*The Court* inquired if there was any authority extending the doctrine of relation to the conveyance by the commissioners of the bankrupt's freehold, for without some authority it would be going too far to carry it to that extent; and (no authority being cited) they said that it remained in the bankrupt, though not beneficially, until taken out of him by the conveyance.

Rule refused.

(*a*) 2 *Rep.* 26. *a.*

(*b*) 2 *East*, 258.

1814.

Tuesday,  
May 3d.

DOE, on the Demise of ELIZ. HICK, against  
DRING.

Devise of "all and singular my effects of what nature or kind soever," will not pass the real estate, where it cannot be collected from the will itself that such was the testator's intention.

**EJECTMENT** tried at the *Lent* assizes 1813 for *Norfolk*, before *Grase J.*, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

*Robert Hick* being entitled, as heir at law to one *Joseph Hick*, to the undisposed of reversion in fee of certain freehold estates in *Norfolk* and *Cambridgeshire*, expectant on the death of *Ann* the widow of the said *Joseph*, who was tenant for life under the will of the said *Joseph*, which estates were in 1776, at the death of the said *Joseph*, of about the yearly value of 40*l.*, married the lessor of the plaintiff, by the name of *Elizabeth Watte*, widow, whose former husband, *Isaac Watte*, was then living; but that fact was unknown to both parties. Afterwards the said *Robert* made his will, dated the 6th of *April* 1807, and properly executed by him in the presence of and attested by four witnesses, in the following words: "I *Robert Hick* of, &c. do declare this to be my last will and testament, by which I do give and bequeath to my wife *Elizabeth*, or reputed wife, all and singular my effects of what nature or kind soever, to her own use and enjoyment during her natural life, and at her death to be equally divided between our surviving children." The testator died soon after the making of his will without revoking or altering the same, and leaving the lessor of the plaintiff, his supposed wife, and three sons now living, namely, *Joseph*,

*seph, Robert, and John*, all baptized as their children, and having obtained that reputation in the lifetime of the testator. *Ann*, the tenant for life, died in 1811. The defendant *John Dring* is the son and heir at law of *Susannah*, the sister of and heir at law to the testator, who married one *John Dring*. The testator died possessed of personal estate to the amount of about 118*l.*, and in his lifetime, and in the lifetime of *Ann* the tenant for life, had an offer made to him for the purchase of his reversionary interest in the estate in question, which he declined to accept.

The question for the opinion of the Court is, whether the reversionary interest of the said *Robert Hick* does or does not pass under and by virtue of his aforesaid will to his widow, the lessor of the plaintiff. If it does, the verdict to stand; but if not, a verdict to be entered for the defendant.

This case was argued in last *Hilary* term by *Blosset* Serjt. for the plaintiff, and *Best* for the defendant, when the Court, in the absence of *Dampier J.*, gave judgment in favour of the defendant; but some days afterwards they intimated to the counsel for the plaintiff, that if it was desired, they would hear a second argument; and so the case was again argued on this day by *Holroyd* for the plaintiff, and *Best* for the defendant. For the plaintiff it was argued in substance as follows: The reversionary estate of the testator passed to the lessor of the plaintiff under the word *effects*. That the word *effects* is capable of carrying the real estate, if it be used with that intent, is clear as well from the rule of law as from authorities. The rule of law is this, that the words which a testator uses, who is supposed to be

1814.

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 Does  
against  
DAING.

Tuesday, Feb. 1.

Tuesday, Feb. 8.

1814.

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 Doe  
 against  
 Dring.

inops consilii, shall not be taken strictly, but shall give way to the intent, notwithstanding they may not be apt to such an intent, but may even be repugnant to it. Therefore in *Doe v. Tofield* (a) the words *personal estate* were held to carry the real; and so the word *legacy* may signify a devise of land (b). Now in order to collect the intent, the Court will look not only to the words of the will, but also, considering the situation and circumstances of the testator, to the frame and object of it; which in this case was clearly for the provision of his wife, or her whom he reputed to be such, during her life, and for his children after her. And the greater value of the real property as compared with the personal is also material in this case, to enable the court to judge whether it was likely that the testator should have overlooked it (c); and to the same end it is stated that an offer was made him for the purchase of his reversion, to shew that it is not probable that he could have forgotten he had such an estate. Again, the will is executed and attested in such a form as of necessity imports an intent to pass the real estate. For all which reasons it is submitted that there is an apparent intent to pass the real estate, and if so, the word *effects* is sufficient for that purpose. And as to there being no introductory clause in this will expressive of the intention to dispose of every thing which the testator had, it has been truly said that very little inference can be drawn from mere formal words of introduction (d). But, 2dly,

(a) 11 *East*, 246.(b) 1 *East*, 37. note (b).(c) Per *Chambre J.* in *Roe v. Tend*, 2 *N. R.* 221.(d) Per Lord *Ellenborough C. J.* 14 *East*, 372.

independently of any intention, the word *effects*, as it is found in this will, does of itself pass the real estate. The words *all and singular*, and *of what nature or kind soever*, with which it is coupled, shew at least, that it was intended to bear the largest possible construction that the word is capable of. And there is nothing *ex vi termini* to confine its construction to things personal, as contradistinguished from things real. In *Rex v. Aslett* (a) Lord *Alvanley* said, "*effects* is a very large and general term, and is confined to no particular description of property either in specie or value." In its etymology it is derived from *efficio*, to accomplish, and means such things which a man has gained or acquired, and, in a more general sense, which he hath; it is synonymous with a man's substance, or all he is worth; and a devise of all he is worth has been held *per se* to pass the real estate (b). So in *Hogan v. Jackson* (c) Lord *Mansfield* took *effects* to be synonymous with worldly substance, which, he said, meant whatever could be turned to value; and therefore real and personal effects meant all a man's property; and yet it is observable that that was a devise of "all the effects both real and personal which he should die possessed of," which therefore imported a chattel interest; and the testator died possessed of leases which would have satisfied the word "effects" in a more restrained sense; nevertheless it was held to carry the fee. That therefore is a strong authority, deciding upon the natural import of the word *effects*, and shews that "*effects of what nature or kind soever*," in the present instance

1814.

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 Done  
against  
Dying.

(a) 1 N. R. 12.

(b) *Huxley v. Brooman*, 1 Br. Ch. R. 437.(c) *Cowp.* 304.

1814.

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 Doe  
 against  
 Dring.

must mean all his property; for what difference is there between a man's saying *all my effects real and personal*, and his saying *all my effects of what nature or kind soever*? If in that case real *effects* meant real property, and carried the fee, in this, *effects* must mean *property*; and the word *property* will carry a fee; *Doe v. Langlands* (a). So in *Doe v. White* (b), and *Doe v. Trout* (c), the word *effects*, and in *Doe v. Lainchbury* (d), both *property* and *effects*, were held to comprehend the real estate. And *Camfield v. Gilbert* (e) does not decide more than this, that the sense of the word *effects* may be restrained by the context. It is so restrained in several of the bankrupt statutes, where it is used in contradistinction to *estate*; but that is no reason for restraining it in all cases.

For the defendant, it was denied that the Court could look to circumstances dehors the will in order to collect the intention; and therefore it was said that this was a mere question upon the construction of the word *effects*, simply, and as it stood alone, without any thing to mark in what particular sense the testator used it; and that unless the word *effects* did proprio vigore pass the real estate, the rule that the heir at law shall not be disinherited but by express words or necessary implication, must prevail. But it was insisted that *effects*, in its natural and legal acceptation, is confined to personalty; and all the cases where it has been carried farther, will be found to have depended upon context, and therefore not to help this case, where the construction is merely upon the word itself. And sometimes, as it is admitted,

(a) 14 East, 370.

(b) 1 East, 33.

(c) 18 East, 394.

(d) 11 East, 290.

(e) 3 East, 516.

context

context will restrain instead of enlarging the sense of general words; as in *Doe v. Buckner (a)*, and *Hilton v. Kemworthy (b)*. But independently of all context, whenever the Court has had occasion to consider the primary import of the word effects, it has always held it to relate to things personal only.

1814.

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Doe  
against  
Dring.

LORD ELLENBOROUGH C. J. No case has ever yet come before the Court touching either a will or any other subject, that I am aware of, where the Court have been called upon to pronounce on the technical meaning of the word effects, denuded as it is here of all context, unless indeed the words "of what nature or kind soever" can be considered as context and explanatory of it. In *Camfield v. Gilbert*, and *Doe v. Lainchbury*, it was taken for granted that effects in its natural signification imports personal effects; and no case has yet occurred in which that signification unaided by context has been extended to real estate. Where a testator has used the general introductory words "as to all my worldly substance," and the word effects has been coupled with the words "real and personal," as in *Hogan v. Jackson*, there it has been considered that the context gave it a more enlarged and comprehensive sense than it would otherwise have borne, and the word effects has from the declared intention of the testator been holden to pass the whole interest in the lands. And so in *Doe d. Chilcot v. White* the words "said effects" by reference to the antecedent bequest, which comprehended both real and personal, were holden to include the real also; but that was so held by the Court not upon the import

(a) 6 T. R. 610. (b) 3 East, 553.



1814.

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 DoT  
 against  
 DRING.

of the word effects simply, but as it derived force from the reference that was given to it. On the other hand it may be said, that in *Camfield v. Gilbert* the Court in holding that the word effects did not extend beyond the personalty, did not decide upon the general import of that word, because there was some context which favoured the narrower construction, for the testatrix excepted out of her effects her wearing apparel and plate, which was an exception clearly of a personal nature, and also directed that her effects should be divided by her executors. In the present case therefore, for the first time, the Court is called upon to give it a sense unaided by context. We have a familiar meaning attached to the word effects, in its common use, and as it is used in the statutes relating to bankrupts, where estate and effects, *reddendo singula singulis*, denote, the one things personal, the other things real; and I am not aware of any case where it has been holden in its primary and original signification to mean things real. In the present case, if I were asked my private opinion as to what this testator really meant when he made use of the word, I must suppose that he meant, that which his duty prescribed to him, to convey all his property for the maintenance of his family; but sitting in a court of law I am not at liberty to collect his meaning from matter *dehors*, but only from the expressions used on the face of the will. The rule of law is peremptory that the heir shall not be disinherited unless by plain and cogent inference arising from the words of the will. Here the subsequent words, "of what nature or kind soever," are tacitly implied in the preceding word "all," and carry the sense no farther; they are not an expansion of the word effects beyond its natural meaning. Admitting

that they import that it shall be taken in its most enlarged sense, I am content to take it so, but I cannot go beyond its natural sense. It is no doubt a matter of great regret to be compelled so to decide, because one cannot but feel that such a decision may, and perhaps will, disappoint what ought to have been and what probably was the intention of the testator; but we cannot yield to our wishes and overstep the fair rule of construction, in order to give to the word a sense more agreeable to our inclinations and the testator's duties, which sense it does not of itself bear. We are bound by the terms which he has used, and cannot look beyond them into extrinsic matter for their interpretation; and in the two cases which I at first mentioned it was considered that effects primarily imported only personal effects. I think therefore that there must be the same judgment as we before pronounced.

1814.

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Don  
against  
Daine.

LE BLANC J. If the Court were at liberty to look to extrinsic circumstances, to the nature or comparative value of the real and personal property, or to the situation in which the testator stood with regard to his family, in order to see what disposition of his property he probably intended to make, they would undoubtedly be inclined to say that he must have intended to pass his real estate. But that would be a very dangerous rule to go by, because it would be to say that the same words should vary in their construction according to the quantity of the property or the situation of the party disposing of it: and that the will of one man who had a lawful wife and legitimate children, and the will of another man who had lived with a woman not lawfully but reputedly his wife, and who had illegitimate chil-

1814.

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 Doe  
 against  
 Dring.

dren, and died seised and possessed of real and personal property, should receive a different construction. Therefore to avoid any such incongruity the Court seeks the construction in the words alone of the will. In the present case there is no introductory clause, and the circumstance of the attestation by four witnesses is not enough of itself to shew a clear intention by the testator to devise his real property. Then the words of the devise are, "all and singular my *effects* of what nature or kind soever." The question is, what is the meaning of the word *effects*. If the Court can see that the testator meant by it to pass his real estate, then the judgment must be for the plaintiff; but if we are not perfectly satisfied upon that point, then the judgment must pass for the heir. It has been argued on behalf of the plaintiff, that we are to construe the word *effects* by looking to the different ways in which different testators may have used it in the several cases. But I doubt if that be a safe rule: the safer rule is to abide by such construction as courts of justice have put on the word. Referring to decided cases we cannot but collect from two of them at least, decided at considerable intervals, that the Court has treated the word *effects* in its primary sense as passing only the personal and not the real estate. If that be so, let us see whether in this instance it can be extended beyond its primary sense to carry the real estate. Without going through the cases which have been stated at the bar and commented on by my Lord, it is enough to observe that they all turned upon the construction which was due to the word *effects* as it was aided by the context. But there is not the aid of context in this case, but the question resolves itself into what is its primary signification; and that I take it is

confined to things personal. It has been so used in several acts of parliament, and particularly in the acts relating to bankrupts. Upon the whole I cannot see any way clearly enough to say that in this instance the word was used with intent to pass the real estate; and therefore there must be judgment for the defendant.

1814.

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Don  
against  
LIVING.

BAYLEY J. I have entertained considerable doubts upon this case. It seems to me however that the plaintiff is not entitled, but that the defendant is. In order to entitle the plaintiff, we must be satisfied that it was the intention of the testator to pass his real property. If that is left in doubt on the face of the will, the necessary consequence is that we ought not to change the possession, and take it from the heir and give it to the devisee. There is not any case in which *effects* per se without context has been holden to pass real property. There are many cases where the word is used, and being a word of an equivocal nature it may be made to pass the real, or may be confined to personal property. This is the first case where the word presents itself nakedly to be considered. Here are no introductory words shewing an intention in the testator to dispose of the whole; the probability is indeed in almost all cases that the testator means to pass the whole of his property; but that is not enough unless he use words to shew clearly that he so intends. Here the preceding words are *all and singular*, which to a certain degree are words of division, and perhaps upon a critical examination have reference rather to a chattel interest than the entire interest in lands. Then follow, *of what nature or kind soever*, which I am not aware have ever been decided to enlarge the sense of *effects* beyond its natural

1814.

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 Doe  
 against  
 DRING.

natural import, and make it comprehend the real estate. In *Camfield v. Gilbert* the accompanying words were of larger extent than here; they were, *wheresoever and whatsoever, and of what nature, kind, or quality soever*; and though it is true, as it has been observed, that they were restrained by the context, yet the case shews that such general words as those do not necessarily indicate an intention to dispose of the real estate. In *Hogan v. Jackson* Lord Mansfield certainly considered *effects* as a word of very general and extensive signification, and if his authority stood alone, I should be inclined to think that he considered the word *effects* as sufficient in itself to pass the real estate. But the subsequent cases of *Camfield v. Gilbert*, and *Doe v. Lainchbury*, have treated it otherwise, and as applying only to personalty in its primary signification. It is of great importance, and particularly so in the transmission of real property, that settled rules of construction should be observed; and I do not find according to these rules such a clear intention apparent on the face of this will as will extend the word *effects* beyond its ordinary legal acceptance.

DAMPIER J. I have had considerable doubts upon this case. The external circumstances of this family would have led me to wish that an authority could have been found to justify our concluding that this testator intended to pass his real estate. But I agree with what has fallen from my Brother *Le Blanc*, and that we cannot look for such intention beyond the words of the will. The heir at law has an interest to be taken away from him only by clear expressions in favour of the devisee. All the cases which depend upon context seem to me to have no bearing upon the present, because

cause they all turn upon the intention, and not upon the natural import of any particular expression; so much so, that in one of the cases which has been alluded to, even the words personal estate, which are clearly restrictive, were held to carry the real estate by reason of the clear intention manifested by the context. But in this case there is no context to indicate any intention; the words are, "all and singular my effects;" and there does not appear to be any decision upon these words nakedly and without context, extending them to the passing of real property. In many acts of parliament the word effects is used as a kind of sweeping word, after enumerating the several species of personal property, and so it is often used in wills. Here it has no adjunct but "of what nature or kind soever," the import of which is before comprehended in the word all, and *expressio eorum quæ tacitè insunt nihil operatur*. It only shews that the testator meant to use effects in its largest natural sense. In *Camfield v. Gilbert* the words were "of what nature, kind, or quality soever," the latter of which is a comprehensive word, but on the other hand there were also the restrictive words, "to be divided by my executors." The question here is, whether these accompanying expressions shall extend the sense of the word effects to real property. In my opinion they are not sufficiently clear and explicit to that intent, and to disinherit the heir at law. They do not give a new sense to the word effects, but only enlarge its ordinary sense.

Judgment for the Defendant.

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Doz  
against  
Dring.

1814.

Wednesday,  
May 4th.

The KING *against* The Inhabitants of MOUNT-  
SORRELL.

Where the father agreed with *R.* that *R.* should take his son for six years, to teach him the trade of a framework knitter, and he was to allow *R.* 9s. a week for the first three years, for teaching him and his board and lodging. Held, that this was a defective contract of apprenticeship, and therefore the son did not gain a settlement under it.

UPON appeal against an order for the removal of *Millicent* the wife of *G. Swain*, and her two children, from *Mountsorrell* to *Quorndon*, the sessions for the county of *Leicester* discharged the order, subject to the opinion of this Court on the following case :

*G. Swain* the husband was born at *Wanlip*, where his father was legally settled. When he was about 13 years old, his father made an agreement with one *Rawlings* of *Quorndon*, that *R.* should take his son for six years, to teach him the trade of a framework-knitter, and he was to allow *R.* nine shillings per week for the first three years, for teaching him and his board and lodging. *G. Swain* accordingly served *R.* six years in the whole in *Quorndon*. And whether *G. Swain* was settled in *Quorndon* was the question.

*Beauclerk* and *G. Marriott*, in support of the order of sessions, relied on *Rex v. Laindon (a)*, to shew that this was a defective contract of apprenticeship, and not a hiring and service. That always must depend upon the intention of the parties to the contract; the justices have determined by their finding what their intention was; and surely, for the first three years at least it was nothing more than a contract for teaching the son his trade; and if it was intended as an apprenticeship for the

first three years, it cannot afterwards enure as a hiring and service.

*Reader* (with him *Dayrell*) relied on *Rex v. Little Bolton* (a).

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MOUNT-  
SORRELL.

But the Court distinguished the case from *Rex v. Little Bolton*, inasmuch, as by this contract the son was entitled to none of his earnings, and instead of receiving wages from his master, his master was to receive wages from him as the price of teaching him; it was a hiring of the master to teach the apprentice. The whole contract with the father was bottomed, and had for its object, the instruction of the son and nothing else.

Order of Sessions confirmed.

(a) *Cal.* 367.

### The KING against The Inhabitants of STANDON.

Wednesday,  
May 4th.

AN order of two justices for the removal of *Ann*, widow of *Joseph Farmer*, and their three children, viz. *Ann* aged nine, *George* aged seven, and *Charles* aged four years, from the parish of *Eccleshall* to the parish of *Standon*, was confirmed at the quarter sessions for the county of *Stafford*, subject to the opinion of this Court on the following case:

Where a son having agreed to purchase a piece of land for 6*l.* applied to his father, who consented to advance 20*l.* left to his wife, on condition, that a house should

be built by the son on the land, which the father and mother were to have for their lives and the life of the survivor, and afterwards, the same to go to the son, but the father and mother were not to sell or dispose of it, nor to take any other family into the house; but this agreement was only by parol; and afterwards the father advanced the 20*l.*, and the son completed the purchase, and the land was conveyed to him in fee, and he built a house, of which the father and mother took possession with his consent, and lived in it for three years, without paying any rent, when the father died, and the mother continued in possession: Held, that the father did not gain a settlement by the residence on the land, nor was the mother entitled to reside on it irremovably.

*Ann*



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STANDON.

*Ann* is the widow of *Joseph Farmer* deceased, who about five years ago was settled at *Standon*. About that time *Joseph* their eldest son agreed to give 65*l.* for a piece of land containing three roods and 33 perches situate in *Eccleshall*, which was offered to sale by the commissioners under an inclosure act; but not having sufficient money himself, he applied to his father, who consented to advance 20*l.* (which had been left to his wife *Ann*) upon the following conditions: viz. that a house should be built by the son upon the land, which the father and mother were to have for their lives, and the life of the survivor; after whose death the same was to go to the son; but it was also agreed that the father and mother were not to sell or dispose of the place, nor to take any other family into the house. The father was at that time advanced in years, and the son wished to shew his good will towards him and his mother and to assist them all he could. This agreement was not reduced into writing, but the father having advanced the 20*l.* to the son, the whole 65*l.* were then paid by the son for the purchase, and the land was conveyed by the award of the commissioners to the son in fee. The house was built immediately afterwards at the son's expence, but the father assisted personally in building it. When finished, the father and mother took possession of it with the consent of the son, who did not think himself at liberty to turn them out, nor did he ever attempt to do so. The son lived in another house, and his father and mother paid no rent to any person, and after having resided in the house about three years, the father died, and the mother continued to live in it as before, with the son's consent, until her removal under the order to *Standon*.

*Petit*

*Petit and Barnes*, in support of the order of sessions, contended 1st, that whatever interest in the land the father might be supposed to derive under the agreement and by the advance of the 20*l.* to the son, it was not an interest that would confer a settlement, because it was acquired by purchase for less than 30*l.*, and so was within the stat. 9 G. 1. c. 7. s. 5. And the nature of the mother's interest was not changed by survivorship, because she being a joint purchaser with her husband, took by entirety, and the whole interest vested in her as survivor by purchase (a). Therefore the utmost that she could be entitled to would be a right to reside irremovably on the estate with such child as was within the age of nurture; which would leave the other two children removeable (b). But 2dly, they contended, which was the main point, that the pauper had not such an interest as was sufficient to entitle her to reside on the estate irremovably. By the statute of frauds (c), this agreement, being by parol, could not have the effect of creating either in law or equity a greater estate than an estate at will; that would not be sufficient: or supposing it could be considered as a lease from year to year, that would not do, because the premises are not found to be of the yearly value of 10*l.* But it cannot be denied that an equitable interest is sufficient in many cases to give the party a right to reside on the land (d); which was an extension of the principle, originally applicable to the freehold only, in favor of paupers at a time when they were removeable as likely to become chargeable; but now the stat. 35 G. 3.

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against  
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(a) *Rex v. Dunchurch*, Burr. S. C. 553.

(b) *Rex v. Hemlington*, Cald 6. S. C., 1 Doug. 9. s. 2.

(c) 29 Car. 2. c. 3. s. 1.

(d) *Rex v. Holm East Waver*, 16 East, 122., per *Ld. Ellenborough C. J.*

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c. 101. has altered the law in that respect, and made any further extension unnecessary. Therefore, however it may be in those cases where there is a clear equitable interest, yet if it be doubtful whether the occupier would be entitled in equity to a conveyance of the legal estate, this Court has never yet, and will not, in this collateral manner, decide that question. Now here the purchase money being only in part paid by one person, and the whole legal estate being conveyed to another, there could not be a resulting trust by operation of law for the person who paid such part (a) so as to bring the case within the proviso of the eighth section of the statute of frauds. Then taking this to be an executory agreement, within the fourth section, the question would be whether the party could compel a specific performance in a court of equity. And it may be asked, is that a fit question for the sessions to determine? Whether by delivery of possession and other acts of the parties such an agreement be executed (b), or taken out of the statute, depends upon nice considerations of equity, upon which even this Court is not competent to decide; the principles on which courts of equity decree being so inseparably connected with their forms of proceeding, that they cannot be applied by a tribunal, which does not proceed according to those forms. It was this consideration which probably influenced *Lord Hardwicke*, when he said in *Rex v. Tedford* (c) "that the justices are not to inquire concerning fraud between the parties; for that would make them a court of chancery." To instance in a few par-

(a) *Lloyd v. Spillet*, 2 Atk. 150. *Crop v. Norton*, *ibid.* 74.

(b) *Butcher v. Butcher*, 1 Vernon, 363. *Pyke v. Williams*, 2 Vern. 455.  
*Clinan v. Cooke*, 1 Schol. & Lefr. 41.

(c) *Burr. S. C.* 60.

ticulars

ticulars only, how widely different are the rules of proceeding in law and equity upon a question like the present. First, in equity, if the defendant were to deny that any parol agreement took place, a Court of Equity would not inquire into the truth of that denial; a witness could not be heard; or if heard, unless his testimony were supported by special circumstances, giving greater weight to it than the denial by the answer, the Court would not make a decree (*a*). Again in equity if the party admits the parol agreement, but insists upon the statute, it seems to be the better opinion that he shall not be compelled to answer as to the part performance (*b*). At the sessions he would be bound to answer every question (*c*). Again it has been considered in equity that the payment of money is not to be deemed part performance to take a case out of the statute (*d*); and that nothing is a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed (*e*). And it lies very much in the discretion of a Court of Equity whether they will compel a specific performance or not, and many times they will not, but remit the party to his remedy at law for the purchase money. From all which considerations it is clear that the sessions do not proceed according to the rules of Courts of Equity, but oftentimes the very reverse; they can only decide upon the general balance of testimony without reference to the forms of proceeding, or rules of evidence in Courts of Equity; and therefore not only shall they not be required, but shall not be permitted, to enter upon doubtful questions of Equity.

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(*a*) *Coeth v. Jackson* 6. *Pes.* 39.    (*b*) *ibid* 37.    (*c*) 46 *G.3. c.* 37.  
(*d*) *Clinan v. Cooke* 1. *Schol. & Lefroy* 40.    (*e*) *ibid.* 41.

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ants of  
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Neither will this Court introduce a new head of settlement by contract instead of estate; where it is doubtful whether the party by going to a Court of Equity could compel a specific performance of that contract. No case has decided in favor of that point though *Buller J.* touched upon it in *Rex. v. Lopen.*<sup>(a)</sup>

*Peake* and *Puller*, contra, upon the first point, contended that this was not a purchase within the 9-G. 1. c. 7., not being for money only, but also in consideration of natural love and affection, for so the case states, that the son wished to shew his good will to his father and mother: therefore the father gained a settlement by residence on the estate. 2dly. The mother was irremovable. And that certainly depends upon, whether a Court of Equity would not have decreed a conveyance. Whatever difficulties may be supposed to obstruct the inquiry in the Court below, this Court surely is capable, by reference to known rules and decided cases in equity, of forming a judgment upon that subject. In *Rex v. Betterton*, (b) *Lord Kenyon* professed to decide a question of settlement upon reference to what a Court of Equity would have done in that case. So here by reference to the rules of equity, it seems that this would be considered a trust by operation of law, and so not within the statute of frauds; for the legal interest is in another, but the purchase money has been paid by a third person; it is therefore a resulting trust for him who paid the money (c); and it is stated, that there has been a part performance by delivery of possession, as well as payment of the money to take the

(a) 2 T. R. 582.

(b) 6 T. R. 554.

(c) *Willis v. Willis*, 2 Atk. 71. *Lloyd v. Spillet*, *ibid.* 150.

agreement out of the statute (a); so that a Court of Equity would decree performance, that is, a conveyance of a conditional estate for the lives of the father and mother, and the survivor, according to the terms of the agreement. Thus a devise, that *J.S.* his wife and children shall have free liberty and power, during their natural lives, to dwell in the same house they now live in, has been adjudged to give an estate to *J.S.* (b). And as to the condition annexed to this agreement, that the father and mother should not take in any other family, it is nothing more than the common case of a grant, with a proviso that the grantee shall not assign, or let in any other person upon the premises.

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tants of  
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LORD ELLENBOROUGH C. J. It appears clearly from the very learned and ingenious argument with which the case was opened, that no estate either legal or equitable was conveyed to the father or mother, nor any such interest probably as a Court of Equity would have decreed to be conveyed. They had nothing more than a conditional and qualified licence by parol to occupy, irrevocable perhaps, except on breach of the condition not to let in any other person. This is not like the case of a devise; here is no gift or grant of an interest in the land; and the parties seem to have been aware of that, for they stood by and suffered the whole to be conveyed to the son, resting merely on his parol licence that they should live there.

LE BLANC J. The ground on which this case is rested, is that a party cannot be removed from his own

(a) *Gunter v. Halsey*, *Ambl.* 586.

(b) *Rex v. Woodburn*, *Burr.* S. C. 785.

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against  
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STANBOK.

estate. The cases decide that if a party has clearly an equitable estate he shall not be removed from it. But the Court must see clearly that he has an equitable estate which would be perfected in him by the intervention of a Court of Equity. I think the argument here has failed in shewing that these parties could, by resorting to a Court of Equity, have obtained a conveyance of the legal estate.

*Per curiam,*

Order of Sessions confirmed.

Wednesday,  
May 4th.

The KING against the Inhabitants of STREATHAM.

By stat. 51 G. 3. c. 107. (respecting the parish of *Clapham*) where the yearly rent or value of any house in the parish shall not amount to 20*l.*, or where any house (of whatever yearly rent or value) shall be let out to weekly or monthly tenants, at a rent payable at a shorter period than quarterly, or shall be let out in whole or in part in

UPON appeal against an order for the removal of *T. Laker*, his wife and children, from *Clapham* to *Streatham*, the sessions for the county of *Surrey* confirmed the order, subject to the opinion of this Court on the following case:

*T. Laker* being legally settled at *Streatham* at Christmas 1811 took a house in *Clapham* at the yearly rent of 12 guineas, and continued to reside in and occupy the same with his wife and family until his removal in August 1813. By the 51 G. 3. c. 107. "for the better assessing and collecting the poor and other parochial rates of the parish of *Clapham*," it is enacted (a),

lodgings, the churchwardens, &c. may compound with the landlord for the parochial rates at a reduced rental, and if the landlord shall refuse to compound he shall be deemed the occupier and shall be rated and pay the same, and his goods and also the goods of his tenant shall be distrained for the same, and the tenant shall deduct the same: Proviso that no tenant of any house as before mentioned shall, by reason of his residing in or occupying the same, or by payment of any such rate in manner aforesaid or which shall have been compounded for, be deemed to acquire a settlement in the parish, but in every such case the landlord shall be deemed to have paid the same, &c. Held that this proviso did not restrain a person from gaining a settlement in the parish, by occupying a house at the yearly rent of 12 guineas, which was not compounded for nor refused to be compounded for.

(a) s. 1

“ that where the yearly rent or value of any house, tenement, or hereditament, within the said parish shall not amount to 20*l.*, or where any house, &c. (whatsoever the yearly rent or value may be) shall be let to any weekly or monthly tenants, the rent whereof shall become payable at any shorter period than quarterly, or shall be let out either in the whole or in part in lodgings, or in separate apartments, then, and in every such case, the churchwardens and overseers (if they shall think proper) may compound with the landlord or owner of all and every or any such house or houses, &c., for the payment of the poor rates, and all other parochial rates at such reduced yearly rental as they shall think reasonable, so that no such house, &c. be rated at less than one third or more than three fifths of the annual value; and the landlord or owner of all such houses, &c., is required to enter into such composition: and in case such landlord or owner shall refuse, he shall be deemed and taken to be the occupier of such premises, and shall be rated to, and pay, the said rates charged upon his premises, according to a fair and equal assessment to be made upon the same. And then the act authorises the churchwardens and overseers to levy such rates by distress and sale of the landlord's or owner's goods, provided that no such landlord or owner shall be charged for any increased rent reserved to him on account of his having agreed to pay the rates heretofore charged on the occupiers of such premises, and that the goods of the occupier of any such house for the rates of which the landlord or owner is made liable, shall be liable to be distrained for so much of the rates as become due during his occupation, to the amount of the rent due by him, and he shall

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The Inhabitants of  
STRAATHAM.



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against  
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tants of  
STREATHAM.

deduct the same from the rent then or thereafter due, &c. And then comes the following proviso; provided also, that no tenant or occupier of *any house, &c. as before mentioned* shall by reason of his residing in or occupying of the same, or by his payment of any such rate in manner aforesaid, or which shall have been compounded for as aforesaid, be deemed to acquire any settlement in the said parish; but in every such case the landlord or owner of the premises shall be deemed and considered to have paid the same, any law, or statute to the contrary hereof in any wise notwithstanding." It was not proved that the landlord of the pauper's premises had compounded or refused to compound for the parochial taxes imposed on the said house. The sessions were of opinion, that the pauper did not gain a settlement in *Clapham* by his residence in the house. And the question was whether by reason of this proviso the tenant of any house within the parish under the yearly rent or value of 20*l.* is prevented from gaining a settlement; or whether the proviso is confined to such houses as the churchwardens, &c. shall have compounded for with the landlord, or the landlord have refused to compound for.

*Cowley* in support of the order of Sessions contended, that the proviso was general as to all houses under the yearly rent or value of 20*l.* without regard to whether compounded for or refused to be compounded for. And he observed upon the wording of this proviso that it was general, "no tenant of *any house* as before mentioned, shall be deemed to acquire a settlement," &c. and one of the classes of houses before-mentioned is that where the yearly rent is under 20*l.* But in the other  
parts

parts of the act where it clearly speaks of houses compounded for or refused to be compounded for, it uses the words *such houses*, and in the former proviso that "*no such landlord*," &c.

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against  
the Inhabitants of  
STREATHAM.

LORD ELLENBOROUGH C. J. Whatever the legislature has enacted we must abide by, and must give it the fair construction which is required; but we shall not feel disposed to go one step beyond that, in order to give an extraordinary effect to an act of parliament abridging, in fraud of all the other parishes of the kingdom, the general right of all His Majesty's subjects to acquire a settlement in this parish. A vast number of attempts has been made to introduce similar clauses, but they have been met with a commendable industry. Here it is very clear that the parish do not bring themselves within the terms of their own act, and therefore the general law of the land attaches upon them.

LE BLANC J. Although the proviso in words restrains the tenant of *any house*, and not *such house*, from gaining a settlement, it is very clear what is meant by that, for it not only says *as before mentioned* but adds that, *in every such case*, the landlord or owner shall be deemed to have paid the rates.

DAMPIER J. "Any house as before mentioned," I take to be equivalent to "*such house*;" if the one is restrained so is the other.

*Per Curiam,*

Order of sessions quashed.

*Lawes and Nolan* were against the order of sessions.

1814.

Wednesday,  
May 4th.

The KING *against* The Inhabitants of SEACROFT.

Where a person engaged himself as waiter at an hotel, and had the tap or privilege of selling malt liquors there, and the use of the cellar for holding the liquors, which had a separate entrance and of which he kept the key, and paid for his situation of waiter, and for the tap and cellar the yearly sum of 60*l.*: held that this was not such an occupation of the cellar as to confer a settlement.

This court will not upon a case stated presume a hiring for a year, for that is a fact to be found by the sessions.

UPON a question touching the settlement of *S. Jackson*, widow, and her four children, which came on before the justices at sessions for the *West Riding of York*, upon appeal against an order for their removal, the case was this:

The husband of the pauper while renting and occupying a house in *Leeds* of the yearly value of 6*l.*, engaged himself as waiter at the hotel in *Leeds*; and at the same time had the tap, that is, the privilege of selling malt liquors there; and for the convenience of holding his liquors, had the use of the cellar belonging to the hotel, which had a distinct and separate entrance, and of which he kept the key. He paid in the whole for his situation as waiter, and for the tap and cellar, the yearly sum of 60*l.* The annual value of the cellar independently of the privilege of the tap, was upwards of six pounds.

The question before the justices was whether the husband gained a settlement in *Leeds*; and they being of opinion that he did not, confirmed the order of removal to *Seacroft*, his former settlement, subject to the opinion of the Court upon the above case.

*Littledale* in support of the order of sessions, said, that the cellar was merely a perquisite attached to the office of waiter, and not a holding of it as a tenant.

*Scarlett* contra, contended 1st., that the Court might presume from the facts stated that he was engaged as waiter by the year; and 2dly., that the husband must be considered as having rented the cellar during the time that he was engaged as waiter; the rent was included in the annual sum he paid for his situation as waiter; and he had a distinct possession, for he kept the key. And it makes no difference that he held it only for so long as he should continue waiter, because a tenancy at will is sufficient to confer a settlement; the question is, whether he did not come to settle on a tenement of 10l. a year.

*The Court* said on the first point, that the sessions and not this Court were the proper forum to draw the presumption of a hiring for a year, which they had not done; 2dly., that there did not appear to be any taking of the cellar as a tenant, but the use of it was only a privilege allowed him in respect of the principal thing which was the hiring himself as a waiter. That before a party can be said to come to settle in a tenement, there must be something like a taking of it as a tenant.

Order of Sessions confirmed.

### DOE *against* JONES.

**D**EBT against the Marshal for an escape of one *Shewin* in execution for damages and costs, in an action of *Doe v. Shewin* for mesne profits.

*Tindal* moved for a rule nisi to set aside the proceedings, in order to question whether this action for

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1814.

The KING  
against  
The Inhabitants of  
SEACROFT.

Wednesday,  
May 4th.

The nominal plaintiff in ejectment in whose name the mesne profits have been recovered may sue for an escape of the defendant in execution for such mesne profits.

1814.

**Doe**  
*against*  
**JONES.**

an escape could be brought in the name of *Doe* the nominal plaintiff, instead of the real plaintiff who sustains the injury.

But the Court refused the rule; for if the nominal plaintiff may sue for mesne profits, he may also sue in this action.

*Thursday,*  
*May 5th.*

**SPOONER and others against GARLAND and others.**

The Court refused to set aside an execution issued pending a writ of error, where after judgment against defendants, their attorney proposed to give a cognovit for the debt and costs payable at a future time, and offered to sign it, observing that it would save expence to the parties, as he should otherwise be under the necessity of bringing a writ of error to obtain the time he had requested in the cognovit, for that he must obtain time.

**R**ULE to set aside the execution, on the ground of its having issued pending a writ of error. After judgment for the plaintiffs, the defendants' attorney in last *Hilary Term*, proposed that the defendants should give a cognovit for the debt and costs payable in *Easter Term*, which the plaintiffs' attorney declined. Afterwards the defendants' attorney made a second application to him to take the cognovit as proposed, and offered to sign it, observing at the same time, that he (the plaintiffs' attorney,) would save a great expence to the parties, as he (the defendants' attorney) should otherwise be under the necessity of bringing a writ of error in parliament, to obtain the time he had requested under the cognovit proposed, for that he must obtain time. The question was, whether the defendants' attorney had not admitted the writ of error to be merely for delay.

*Taddy* in support of the rule cited *Rawlins v. Perry (a)*, and observed that what was said by the de-

(a) 1 N. R. 307.

defendants'

defendants' attorney was pending a negotiation, and before the suing of the writ of error.

1814.

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SPOONER  
against  
GARLAND.

LORD ELLENBOROUGH C. J. Loose conversations of the attorney would certainly not be sufficient to fix the party with a purposed object to delay; but when such a conversation as this is held at a period of the cause when a writ of error, if delay was intended, became most material and necessary for obtaining such delay, it is, I think accredited by the time of holding it.

BAYLEY J. referred to *Pool v. Charnock (b)*.

DAMPIER J. referred from memory to a case where a party applied for time, and upon the other side refusing to give it, he said then I must bring a writ of error, and that was holden for delay. Here the party has declared that he must serve the necessary process for delay, with a view of driving the other side to accept the cognovit.

*Per Curiam,*

Rule discharged.

*Marryat* was against the rule.

(a) 3 T. R. 79.

HOLCOMBE against LAMBKIN.

*Monday,*  
*May 9th.*

**R**ULE for discharging the defendant on filing common bail, upon the ground, 1st. that "gentleman of *Chelsea*" was an insufficient description of the deponent in the affidavit to hold to bail; next that the affidavit was against the defendant as acceptor

Affidavit to hold to bail against the defendant as acceptor of a bill of exchange must shew that the bill was due.

of

1814.

HOLCOMBE  
against  
LAMBKIN.

of a bill of exchange drawn by the deponent, but did not shew that the bill was due.

*Espinasse* shewed cause, and relied on *Davison v. March* (a) in answer to the last objection, the Court having intimated that there was nothing in the first.

*Marryat* contra, referred to *Jackson v. Yate* (b) where the Court had taken the distinction between *Davison v. March* which was the case of an indorsee, and the present case which was that of an acceptor; and expressly decided upon that distinction in favour of the objection.

And the Court assented to that and made the  
Rule absolute.

(a) 1 N. R. 157.

(b) *Ante*, 148.

Monday,  
May 9th.

### HAWKINS against SNUGGS.

Where defendant on being served with process declared to plaintiff's attorney he could not pay, that it was useless to go on with the action as he would delay all he could, and when he had got judgment would bring a writ of error and put it off all in his power,

**R**ULE to set aside the execution issued after allowance of a writ of error, and restore the money to the defendant. The action was brought upon a bill of exchange due *March* 1813. The defendant when served with process informed the plaintiff's attorney that he could not pay, that it was useless to go on with the action as he would delay it all he could, and when he (the plaintiff's attorney) had obtained judgment, he would bring a writ of error and put it off all in his

and afterwards brought a writ of error, and on the plaintiff's proceeding to execution, requested him to keep it secret, and acknowledged that he had shewn him lenity, and requested that he might pay the money by instalments: Held that the defendant had admitted that the writ of error was for delay, so as to prevent its being a supersedeas.

power.

power. In the progress of the suit many dilatory steps were taken by the defendant, and time was given to pay at the request of his attorney. After judgment signed and allowance of a writ of error served on the plaintiff's attorney, he went to the defendant's attorney, and told him that as the defendant had admitted the writ of error was brought for delay, he would issue execution unless the defendant would pay; when the attorney said you had better take care of the defendant he is a desperate fellow, and don't mind trifles, and he will oppose you by affidavit, and declares he will indict you for perjury if you swear he ever made such admission. Afterwards upon execution going in, the plaintiff's attorney saw the defendant who requested him to keep it secret as it might injure his credit, acknowledged that he had shewn him lenity and requested that he might pay the money to the officer by instalments, which was consented to, and so received without exposure; no notice being given to the sheriff till payment of the last part of the debt. The question was whether the defendant had admitted that the writ of error was for delay, so as to prevent its being a supersedeas.

*Best* who shewed cause, admitted that in some of the cases it appeared that the declaration of the party, that the writ of error was for delay, had been made after the writ of error brought (*a*); and so he said it was in effect in this case; but according to *Pool v. Charnock* (*b*), it is not necessary that it should be made after the writ of error.

*Curwood* contra, contended that it was not enough that the party in an early stage of the cause has de-

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HAWKINS  
against  
SHUGGS.

(a) See *Law v. Smith* & *Evans v. Gilbert*, 4 T. R. 436. n. c. *Masterman v. Grant*, *ibid.* 714.

(b) 3 T. R. 79.

clared



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HAWKINS  
against  
SNUGGS.

clared he will delay and bring a writ of error. The rule is, that it must be apparent to the Court that the writ of error is brought merely for delay (a), and that, by the declaration of the party himself or his attorney (b). But where that declaration is made, as here, at the commencement of the suit, it cannot appear to the Court that the writ of error was for delay, because *non constat* that there may not be error since, and at the time of the judgment. And in *Christie v. Richardson* (c) Lord Kenyon said that every subject has a right to have his cause reviewed in a court of error. Whatever suspicion therefore may be excited by the defendants' declaration, that is not enough; and as to what passed after the writ of error, upon the execution going in, that appears to have been done only with a view of securing secrecy. The plaintiff under these circumstances ought at least to have applied for leave to take out execution, when both sides might have been heard.

Lord ELLENBOROUGH C.J. Supposing the Court were inclined to adopt the rule that a previous declared purpose of suing out a writ of error for delay would be insufficient, and that there must be a declaration of the purpose subsequently to the time of issuing it, let us see here if there is not something equivalent to it. After the execution issued, it appears that the defendant acknowledges that he had been fairly dealt with, and requests time to pay the money by instalments; and does not an irresistible inference arise from thence, that the writ of error was merely brought for the purpose,

(a) *Per Buller J. in Kempland v. Macaulay*, 4 T. R. 436.

(b) 5 T. R. 669. *Levett v. Perry*.

(c) 3 T. R. 78.

which he had before declared, of delay? At present I can see no harm in laying down the rule thus, that if the party has declared he will bring a writ of error for delay, and afterwards sues one out, it shall be incumbent on him to shew a reasonable ground of error to the Court, or at least that there is some colour for his writ of error. I am not aware however of any case except *Pool v. Charnock*, where there was nothing more than a declaration before writ of error.

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HAWKINS  
against  
SNUGGS.

LE BLANC J. The party comes to set aside the proceedings; it was competent to him now to have shewn wherein the error lies, but he can shew none.

*Per Curiam,*

Rule discharged. (a)

(a) *Spanner v. Garland*, ante, 474.

Ex parte BOWNESS in the Matter of PHILLIPS, a  
Bankrupt.

*Monday,*  
*May 9th.*

*PHILLIPS* and *Hawkins* were bankers in partnership together; *Phillips* also carried on the business of a wine merchant on his separate account. *Phillips* and *Hawkins* as such bankers were indebted to *Penfold* on simple contract in the sum of 4000*l.* *Phillips* committed an act of bankruptcy which was known to *Penfold*; after which *Phillips* and *Hawkins* executed joint and several bonds to *Penfold* to secure the 4000*l.* and interest. Afterwards, *Phillips* still continuing his trade of wine merchant, became indebted to *Bowness* in 800*l.*, and committed another act of bankruptcy, on which a commission issued against him on the petition of *Bowness*, and he was declared bankrupt. There was a joint

The stat. 46  
G. 3. c. 135. s. 2.  
does not re-  
strain a creditor  
from proving  
under a com-  
mission of  
bankrupt, a  
debt contracted  
before the act  
of bankruptcy,  
on which the  
commission  
issued, but after  
notice of a prior  
act of bank-  
ruptcy.

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Ex parte  
BOWNESS.

joint fund belonging to the banking partnership, as well as separate funds belonging to each partner, and *Hawkins* was not a bankrupt. *Penfold* proved under *Phillip's* commission 4094*l.* 10*s.* 4*d.*, (being the amount of principal and interest due on the bonds), against the separate estate of *Phillips*. Upon the petition of *Bowness* to the *Lord Chancellor* to expunge the proof of *Penfold's* debt, his lordship directed the following question for the opinion of this Court: whether the said *Penfold* was entitled by virtue of the said bonds, to prove his said debt under the said commission, as a separate debt due from the said *Phillips*.

*Gifford*, who argued on a former day, maintained the affirmative, and that *Penfold* was not precluded by the stat. 46 G.3. c. 135. s. 2. (a), from proving this debt. He said there could be no doubt that before the statute this debt would have been proveable under the commission, notwithstanding the prior act of bankruptcy, because it was a debt contracted before the act of bankruptcy on which the commission issued; and such debt would have been barred by the certificate. Debts proveable under the commission, and debts to be discharged by the certificate are convertible terms; but debts not due at the time of the act of bankruptcy

(a) 3. 2. enacts, " in all cases of commissions of bankrupt hereafter to be issued, all and every person with whom a bankrupt shall have really and *bond fide* contracted any debt before the date and suing forth of such commission, which, if contracted before any act of bankruptcy committed, might have been proved under such commission, shall notwithstanding any prior act of bankruptcy, be admitted to prove such debt, and to stand and be a creditor under such commission to all intents and purposes whatever, in like manner as if no such prior act of bankruptcy had been committed, provided such creditors had not at the time of such debt being contracted, any notice of any prior act of bankruptcy."

were

were not affected by the commission, and consequently not proveable under it; *Bamford v. Burrel* (a). And with respect to the petitioning creditor's debt, the law still requires that it should be a subsisting debt at the time of the act of bankruptcy on which the commission issues; *Moss v. Smith* (b). But as to the proof of debts, the stat. 46 G. 3. c. 135. s. 2. has afforded this remedy, which is in relief both of the creditor and bankrupt, that debts, contracted before the date and issuing of the commission, shall be proveable under the commission, notwithstanding the act of bankruptcy on which the commission issues is prior to the contracting of the debt, in like manner as they would have been, if such act of bankruptcy had not been prior; such in substance is the effect of that enactment. It is a remedial law, not a restrictive one; it is to enable those to prove who before the statute could not prove, not to impose a limitation on those who could. And, therefore, though the words "notwithstanding any prior act of bankruptcy" are general, they shall not be intended to mean that wherever there has been any act of bankruptcy prior to the contracting of the debt, a creditor shall only be admitted to prove his debt under the condition there imposed; because that would be to restrain the proof of debts and not to enlarge it; for it has already been stated that no such restriction before existed. Yet that must be the argument to shew that this party is not entitled to prove this debt. It may further be observed, that a mere act of bankruptcy not followed up by any commission or proceeding is of none effect; *Foster v. Allanson* (c); and it would be very strange if in con-

1814.

Ex parte Bow-  
NESS.

(a) 2 Bes. &amp; Pull. 1. (b) 1 Campb. N. P. G. 489. (c) 2 T. R. 479.

1814.

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Ex parte Bow-  
ness

sequence of an enactment which was intended to relieve both the creditor and bankrupt, the assignees or petitioning creditor should be enabled to set up an act of bankruptcy in derogation of their own title, which before the statute they could not have done, in order to defeat the creditor of his proof, and the bankrupt of his discharge.

*Marryat* contra, denied 1st, that this debt would have been proveable under the commission before the statute; 2dly, supposing it would, the statute has prevented it, by drawing the distinction between a creditor who does or does not know of a prior act of bankruptcy. 1st, He said that the general rule was, that if the debt be contracted subsequently to any act of bankruptcy, not to the act alone on which the commission is founded, it is not proveable under the commission; and until this statute (s. 5.) even the commission itself was avoided by an act of bankruptcy prior to the petitioning creditor's debt. Therefore, this debt being contracted after a prior act of bankruptcy, was, by the general rule, not proveable under the commission. The statute was intended to give a partial relief in this respect, that is, to such creditors as had not notice of any prior act of bankruptcy; consequently it cannot aid in this case, because the creditor had notice. But 2dly, supposing the debt would have been proveable before the statute, yet the statute has interfered to prevent it; because the enactment is general, "in all cases of commissions, &c. all and every person shall be admitted to prove a debt contracted before the commission, notwithstanding any prior act of bankruptcy, provided

provided he had not any notice of any prior act of bankruptcy." Therefore the enactment clearly imports that in all cases, where he has such notice, he shall not be admitted to prove. And this construction seems reasonable, in respect both of the creditor and the bankrupt; for if the creditor, knowing a man has committed an act of bankruptcy, chooses notwithstanding to give him credit, he cannot be supposed to give credit to his effects; and so also if the bankrupt become indebted under those circumstances, he cannot complain that he remains liable; which certainly would be the consequence of such debt not being proveable under the commission.

1814.

Ex parte Bow-  
NESE.

*Gifford* in reply, in maintenance of his first proposition, that this debt would have been proveable before the statute, referred to stat. 5 G. 2. c. 30. s. 7. which discharges the bankrupt from all debts due at the time he did become bankrupt, therefore, the converse follows that the debt would have been proveable: he also cited *Donovan v. Duff* (a), and *Ex parte Donovan* (b), to shew that it did not lie in the mouth of the assignees to set up the prior act of bankruptcy. But he principally insisted as before upon the act being remedial, whereas the construction *contra* would make it an act for narrowing the proof of debts.

LORD ELLENBOROUGH C. J. The argument with which the counsel has concluded, and which he originally relied on, is I think decisive. It certainly was the object of the act of parliament to facilitate and give

(a) 9 East, 21.

(b) 15 Ves. 6.

1814.

Ex parte Bow-  
ness.

a greater capacity of proving debts on certain terms, and not to abridge it. I feel it unnecessary to go into any other question. If it had not been doubted by the learned mind who has directed this case, I should not have much hesitated. However, as it is, we will look at it again before we certify.

The following certificate was sent :

WE have heard this case argued by counsel, and have considered it, and are of opinion that *Penfold* was entitled, by virtue of the said bonds, to prove his said debt under the said commission as a separate debt due from the said *Phillips*.

ELLENBOROUGH.

S. LE BLANC.

J. BAYLEY.

H. DAMPIER.

May 9th, 1814.

Tuesday,  
May 10th.

Plea in abatement after general imparlance is bad, and may be taken advantage of on special demurrer though not assigned as a cause.

### LLOYD *against* WILLIAMS and Others.

DECLARATION of *Easter* Term, in assumpsit for work and labour as an attorney, with the money counts. After a general imparlance to *Trinity* Term, the defendants plead in abatement that the supposed promises were made jointly with others not named in the bill, and pray judgment of the bill and declaration. Demurrer assigning for cause that the defendants ought to have pleaded in abatement of the bill only, and to have prayed judgment of the bill only (a). Joinder.

(a) *Lee v. Barnes*, 5 *Mod.* 144. *Moffat v. Van Millingen*, 2 *B. & P.* 224-*n. c.*

• Lord

Lord ELLENBOROUGH C. J. inquired how this plea in abatement could be supported after a general imparlance. And *Dampier* J. referred to *Buddle v. Wilson* (a) where on a general demurrer the Court held that the plea in abatement, which otherwise might have been supported, was bad, because pleaded after a general imparlance; which case, he said, was precisely in point, and was founded on *Dacres v. Duncomb*, 1 *Ventr.* 236. And *Bayley* J. added, that you need never demur specially to a plea in abatement.

Judgment *quod respondeat ouster*.

*Puller* was in support of the demurrer.

*Twiss* contra.

(a) 6 *T. R.* 369. See *Evans v. Stevens*, 4 *T. R.* 224.

### HAGEDORN *against* OLIVERSON.

Tuesday,  
May 10th.

**A**SSUMPSIT on a policy of assurance tried before Lord Ellenborough C. J. at the *London* sittings after *Michaelmas* Term, when a verdict was found for the plaintiff for 200*l.* the amount of the defendant's subscription, subject to the opinion of the Court on the following case:

The policy was effected by the plaintiff (a) on or about the 2d of *August* 1810, as well in his own

Where plaintiff effected an insurance on ship as well in his own name as for and in the name of all and every other person, &c. in the usual form, for the benefit of *S.* an alien enemy, and procured a licence to legalize the voyage, and a loss

happened, and two years afterwards *S.* by letter to the plaintiff adopted the insurance: Held that the plaintiff might recover against the underwriter, averring the interest in *S.*

(a) It was stated upon the argument, and so taken, that the plaintiff gave the order to the broker to effect the insurance.

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name



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HAGEDORN  
against  
OLIVERSON.

name as for and in the name and names of all and every other person and persons to whom the same doth; may, or shall appertain, &c., in the usual form, upon the ship *Fiesco*, valued at 2,300*l.* at and from *Gluckstadt*, and any port and ports in the river *Elbe*, to any port or ports in the United Kingdom, with liberty to carry simulated papers, &c. sail under any flag, &c. The declaration averred the interest to be in *F. S. Schroeder* (a), and a loss by capture. At the time of effecting the policy *Schroeder* was and is a subject of the King of *Denmark*, then and now at war with *Great Britain*. In order to legalize the voyage the plaintiff had procured a licence, which was granted to him, by the name of *J. P. H. Hagedorn* of *London*, on behalf of himself or other *British* or neutral merchants, permitting a vessel bearing any flag except the *French* to proceed with a cargo from within certain specified limits, within which *Gluckstadt* was; to any port of this kingdom north of *Dover*, &c. The ship was loaded at *Gluckstadt* in *July* 1810 with a cargo on *British* and neutral account, and sailed from thence under *Danish* colours for *London* on the 26th of that month, and was captured by enemies, carried into a port of *Holland*, and condemned. The policy was effected for the benefit of *Schroeder*, but no letter or order was proved from *Schroeder* before the loss; but a letter from him to the plaintiff, dated the 26th of *July* 1812, before the commencement of this action, was produced, wherein he adopted the insurance in the following terms:

“ I may now, I hope, expect that you have effected a final settlement with the underwriters per

(a) See *Hagedorn v. Reid*, ante, vol. 1. 567. by which it appears that *Schroeder* was interested in a moiety of the ship.

*Fiesco*, and request you to lay out the amount for me in coffee."

No other evidence was given of the connection of *Schroeder* with this policy. The question for the opinion of the Court is whether the plaintiff is entitled to recover; if the Court shall be of that opinion, the verdict is to stand; if not, a nonsuit is to be entered.

*Taddy* for the plaintiff said the question was, whether this insurance, having been effected without a previous order or authority from *Schroeder*, could be available for his benefit. And he admitted, that in general the benefit of a contract made with one person cannot by law be transferred to another; though that is not universally so in the law merchant, as bills of exchange, &c.; and it should seem by analogy to torts that where a contract is made originally for the benefit of a third person, though without his order, it may enure to his benefit if he afterwards agrees to it. Thus in 7 H. 4. 35. upon an inquest between two parties on a writ of trespass for taking cattle, the defendant justified as bailiff for services due to the lord, and the plaintiff traversed that he was bailiff at the time of the taking, and shewed in evidence that the defendant took them upon a claim of a heriot due to *himself*, so that he could not be bailiff at the time to another; and *Gascoigne J.* said that if when he took them he claimed property for a heriot to *himself*, although the lord agreed afterwards to the taking for services due to him, yet could he not be his bailiff for that time. But if he had taken them *without command for services due to the lord*, and the lord had afterwards agreed to this taking, he should be adjudged his bailiff,

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though he had never been his bailiff before." And the same was holden in *Godb.* 109. So here the plaintiff without command has made this policy for the benefit of *Schroeder*, and *Schroeder* has afterwards agreed to it, therefore the plaintiff shall be adjudged his agent for this purpose. And here also the policy being effected for the benefit of all persons concerned, perhaps the mere shewing that he was a person concerned, would have entitled him to adopt it; *a fortiori* therefore where it is shewn that his benefit was individually contemplated in the making of it. This case is very similar to *Wolff v. Horncastle* (a) which was decided upon the maxim *omnis ratihabitio retrotrahitur*, &c. and falls within the same maxim. And by his letter adopting the insurance *Schroeder* has made himself liable for the premium.

*Scarlett* contra. The case from the year books, and that in *Godb.* are founded on this, that if a trespass be done for the benefit of another, who agreeth to it after it be done, his agreement subsequent amounteth to a commandment, and in that case the maxim *omnis ratihabitio*, &c. applies (b). But that is not so in contracts, unless the party who contracts for the benefit of another be his general agent; in which case, if he adopts the contract it will be evidence for him that he authorized the making it. Such was the case of *Wolff v. Horncastle*; the plaintiffs were general agents of the consignor, and made insurance for his benefit, and he afterwards approved of it, and therefore they were held to be the persons who received the order to make it. So in *Lucena v. Craufurd* (c), which was cited for the plain-

(a) 3 B. & P. 316. (b) 4 Inst. 317. (c) 1 Tawn. 325. 2 N. R. 269.  
tiff

tiff at the trial, the *Dutch* commissioners were general agents for the interests of the crown; and besides in that case an order was given contemporary with the insurance, so that this question did not properly arise. And in *Routh v. Thompson* (a) there was also an order to insure from the prize agent appointed by the captors, who not having any interest themselves, were considered as having appointed him as agent on the part of the crown, and on that the decision turned. But here no such order is stated, neither does it appear that the plaintiff was the agent of *Schroeder* in any way; and the presumption is against his being so, for *Schroeder* is an alien enemy. The question therefore comes to this, whether if a total stranger to *A.* make assurance, he shall be at liberty to say that he made it for *A.* without shewing any order for that purpose from *A.* but only a letter from *A.* adopting the insurance two years afterwards, and after a loss has happened when it was clearly for the advantage of *A.* to adopt it. Now that appears to be directly against the stat 28 G.3. c.56. which requires persons effecting insurances to insert in the policy the name either of the consignor or consignee, or of the person who shall receive, or of the person who shall give the order for such insurance.

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*Taddy* in reply said, that if *Schroeder* might adopt the act of the plaintiff then the statute would be satisfied, because the plaintiff whose name was in the policy was the person who gave the order to the broker to effect the insurance. And he maintained that *Lucena v. Craufurd* and *Routh v. Thompson* (b) were authorities

(a) 13 East, 274.

(b) 13 East, 274.

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in point, to shew that he might adopt his act, and that the subsequent ratification shall be referred to the prior order.

Lord ELLENBOROUGH C. J. The difficulty in this case arises from the situation of *Schroeder*, because he might, by refusing to adopt the policy in case the ship had arrived, have got clear of the premium, for if the plaintiff had brought an action against him to recover it, I do not see how he could have succeeded. That constitutes something of an anomaly, because in one event, namely, that of a loss, he might secure himself, and nevertheless might have avoided the payment of the premium, in the other event of the ship's arrival, by declaring that he chose to stand his own insurer. But I do not think that consideration governs the case now before us between this plaintiff and the underwriter. The plaintiff had a right to effect an insurance, on the chance of its being adopted, for the benefit of all those to whom it might appertain; which are the words of the policy. He might insure for those who were actually interested, and possibly for those who might be interested. *Schroeder* was interested, and might become privy to the benefit of this insurance by subsequent adoption, according to *Lucena v. Craufurd* and *Routh v. Thompson*. He has adopted it, and now it is made a question, whether he can become privy to the benefit of it. It appears to me upon those authorities that he may, and may make use of the name of the person at the head of the policy, as the person who had given the order to effect the insurance, which will satisfy the stat. 28 G. 3. c. 56. It seems to me, therefore, that this action is maintainable for the benefit of *Schroeder*,

who was interested at the time, and has become privy by adoption:

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LE BLANC J. The difficulty thrown in the way of the plaintiff has been this, that if *Schroeder*, in the event of the ship's arrival, had chosen to repudiate instead of adopt the contract, he might have done so, and there would have been no means of coming upon him for the premium. But this policy was effected for the benefit of all persons interested, and *Schroeder* was a person interested; and I take it, that after the ship sailed on the voyage insured, the plaintiff was bound by the insurance, and could not have recovered back the premium from the underwriter, by averring that this was a policy without interest; the answer would have been *Schroeder* is interested, and he may elect to adopt the insurance. I therefore conceive the underwriter would have had a right to retain the premium. Then *Routh v. Thompson* is, I think, an authority to shew that *Schroeder* being interested might subsequently adopt the insurance made by the plaintiff. There the crown adopted it after a loss; and the distinction taken in that case, that the party making the insurance was appointed by the captors who had no insurable interest, and therefore, that he stood in the relation of agent on the part of the crown, whose agents the captors were, does not, I think, make any difference. Here the plaintiff was not unconnected with the insurance; he obtained a licence and made insurance for the benefit of the owners, though without communicating with them. *Schroeder*, who is an owner, afterwards adopted it. That case is an authority to shew that he might afterwards adopt it. This, it must be remembered, is a question between the plaintiff and  
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the underwriter, and not *Schroeder* and the underwriter; and unless we saw that the underwriter would not have been entitled to retain the premium, we cannot say that the plaintiff is not entitled to his contract, unless it could be shewn that this is a mere-gaming policy.

BAYLEY J. I think this is a case in which the defendant ought to pay, and the plaintiff ought to receive for a loss under the policy. A loss has happened, upon which the defendant undertook to pay, and if the premium could not have been recovered back from the defendant, there is not any circumstance here which should exonerate him from liability. I think the plaintiff never could have recovered back the premium from the underwriter, because of the uncertainty whether *Schroeder* would adopt the assurance, in respect of which the underwriter would have incurred the risk. While the contract was in *feri* there was not any disposition on the plaintiff's part to have the policy vacated, and if there had been, it would have been an answer to him, that *Schroeder* might have adopted it. Then comes the question whether *Schroeder* is entitled to take the benefit of this insurance. It is stated that it was effected for his benefit, therefore it was intended to cover his specific interest at the time. *Schroeder* had an interest at the time, and although there was not any specific communication at the time, yet as *Schroeder* was connected in the concern, it was reasonable for the plaintiff to expect that *Schroeder* would adopt an act which could be done with no other view than for his benefit. *Schroeder* must be considered as under a moral if not a legal obligation to adopt it although the ship arrived. Being under that obligation

tion in all events, he thinks that he is warranted in adopting it even after a loss, and has adopted it. The case of *Routh v. Thompson* shews that if a policy be effected with reference to the benefit of a person interested, an adoption of it by such person after the loss will be sufficient.

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DAMPIER J. The plaintiff placed himself in an awkward situation by advancing his money for the premiums, upon the expectation that *Schroeder* would adopt his act, which *Schroeder* might have refused to do in the event of the ship's arrival; and if he had, I do not see that the plaintiff could have recovered back the premiums. The question then is whether *Schroeder* had an interest in the policy. He was owner of the ship, and the policy was effected for his benefit; that seems to me to give him an interest. If then he had an interest, his subsequent adoption will be good. *Routh v. Thompson* is a full and clear authority to that point; there the agency was only a constructive agency, and it does not appear to me to afford any distinction, because the insurance did not come within the scope of his agency. Therefore it seems to me to govern this case; there is no distinction in reason though there may be a difference. All the averments in this declaration are certainly fully proved, and therefore the plaintiff is entitled.

Judgment for the Plaintiff.



## CASES IN EASTER TERM

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*Tuesday,  
May 10th.*

**BLACKETT, Bart. against MARY ANN LOWES.**

Where by agreement dated 1656, between the lord and certain tenants of customary tenements within a manor, the tenants covenanted, that they, their heirs or assigns, would not cut down, sell, or dispose of any wood standing or growing, or hereafter to stand or grow, without the licence of the lord, and the lord covenanted to set out yearly, upon request of the tenants, sufficient for the repairing of their houses, &c. and other necessary uses in and about the said tenements, and that in case any of the tenants, their heirs, or assigns, should plant any wood upon the said tenements, it should be lawful for them to cut down, use, and dispose of all or any such wood for repairing their houses, &c., or for any other their necessary uses without disturbance of the lord: Held that defendant, who was tenant of one of the customary tenements comprised in the above agreement, was not entitled without licence of the lord to cut down and sell wood which had been planted on the tenement by a tenant since the agreement, and that having so done, the lord might maintain trover against her for the wood.

**TROVER** for wood. Plea general issue. At the trial at the last *Northumberland* assizes before *Wood B.* a verdict was found for the plaintiff for 60*l.* (the value of the wood) subject to the opinion of the Court on the following case:

By articles of agreement, dated 1656, between *Francis Neville* then lord of the manors of *Ridley* and *Thorngraston* of the one part, and certain persons named and described as tenants of certain customary tenements within those manors of the other; reciting that suits and differences were likely to arise between them, touching the fines, customs, and services which ought or were claimed to be paid and performed for their respective tenements, for prevention whereof, and for settling and ascertaining the same, it was covenanted and agreed by the said parties, that it should be lawful for the said lord, his heirs and assigns at all times thereafter, to take and dispose of any woods or underwoods within their tenements without any interruption from them, their heirs or assigns; he the said lord, his heirs and assigns, leaving sufficient upon the said tene-

Evidence that the tenants of defendant's estate for 30 years and upwards had publicly, and without interruption from the lord, and with his knowledge, cut and sold the planted wood on the estate in large quantities, was held to be admissible in this case, and therefore a new trial was granted; but evidence of reputation that the tenants of defendant's estate had the right of cutting and selling planted wood was held not to be admissible.

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ments for the necessary uses and occasions of the respective tenants, and also giving reasonable satisfaction unto them for all such loss and damage as they should sustain by occasion of taking or carrying away of any such woods or underwoods; and the said tenants covenanted and agreed, that they, their heirs and assigns, or any of them, should not nor would at any time or times thereafter, cut down, sell, or otherwise dispose of any timber, wood, or other wood standing, growing, or being, or which should thereafter stand, grow, or be in or upon their respective tenements, or any of them, without the licence and consent of the lord of the manors for the time being, or his steward or bailiff, first had and obtained, *save* as thereafter was expressed; and the said lord, for himself, his heirs, executors, and administrators, covenanted and agreed with the said tenants, their heirs and assigns, that he, his heirs and assigns, or his and their bailiffs and officers, should and would yearly from thenceforth for ever, upon the request of the said tenants, &c. set forth and allow sufficient timber, wood, and other wood growing upon their several tenements, as often as need should require, as well for the necessary repairing their houses, sheals, and sheds, as of their hedges and fences within the said manors, and for all other necessary occasions and uses whatsoever, in, upon, or about the said tenements; and that in case any of the said tenants, their heirs or assigns, should at any time thereafter set or plant any wood upon any lands or grounds within or belonging to their tenements within the said manors, or either of them, it should be lawful for such tenant, his heirs and assigns, at any time, at his and their wills and pleasures, to cut down, use, and dispose of all or any such wood

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so planted, for the repairing, upholding, or maintaining of their houses, hedges, and fences, or for any other their necessary uses, without any denial, interruption, or disturbance of the said lord, his heirs or assigns, or of any of his or their officers or servants. These articles of agreement were ratified and confirmed in 1656 by a decree of the Court of Chancery. The plaintiff is lord of the said manors, and the defendant one of the customary tenants of the manors, or one of them, in respect of three farms which are part of the ancient customary tenements of the said manors, or one of them, and at the time of making the above agreement belonged to some or one of the parties thereto described as tenants. About *March* last the defendant, without the licence of the plaintiff, cut and sold wood of the value of 60*l.* growing upon two of the farms, or one of them, which wood had been planted by some or one of the customary tenants of the same, since the making of the above agreement. The defendant's counsel at the trial tendered evidence to prove that there were upon the defendant's estate about forty acres of planted wood; that for thirty years and upwards the tenants of the estate for the time being, had openly and publicly, and without any interruption whatever on the part of the lord, cut and sold planted wood growing upon the estate in large quantities; that this was done with the knowledge of the lord whose bailiff lived in the immediate neighbourhood, and that the bailiff's son was for several years employed in cutting and working up for the purchasers the wood so cut and sold, and that the general reputation of the country as far back as living memory extends had been that the tenants of the defendant's estate had the right of cutting and selling planted wood at their free will

will and pleasure. This evidence was tendered as evidence from which a grant, release, or other agreement between the lord and the tenants or tenant, authorizing such use and disposition of the planted wood might and ought to be presumed. The evidence was rejected. It appeared by a note in the handwriting of one *W. Lowes* deceased, under whom the defendant claimed that in *Feb. 1767* the said *W. Lowes*, having occasion for five ploughs and various other implements of husbandry, directed an application to be made to the bailiff of the then lord of the said manors desiring him to set out wood for that purpose.

The question for the opinion of the Court was whether the evidence tendered ought to have been received; if the Court should be of opinion that it ought, there was to be a new trial, unless they should think upon the evidence received, that the plaintiff was not entitled to recover, in which case a nonsuit was to be entered; otherwise the verdict was to stand.

*Scarlett* for the plaintiff, contended that the evidence was properly rejected; because if received it would not have justified any presumption amounting to a defence; for the utmost that could have been inferred from it would have been this, that the tenants, who cut and sold the planted wood with the knowledge of the lord, did it under a licence from the lord, or taking it most strongly against him, under a grant or release made to the particular tenant or tenants who so cut. But what fair presumption could have arisen from this exercise of the right, that it was more than a grant or release to the particular tenants exercising the right, and extended not only to them, but to their successors for all

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time? The evidence therefore was inadmissible, as not leading to any conclusive inference upon the matter in issue.

*G. Marriott*, *contra*, besides insisting upon the defendant's right to a new trial upon the rejection of the evidence, claimed farther to enter a nonsuit; 1st, because it appeared to be the intention of the parties to the agreement 1656, that the tenants should have a controul over the wood planted by them to cut and sell it. It is apparent from the instrument that some distinct privileges as to the power of cutting down and selling the wood planted by the tenants were intended, probably as an inducement to them to plant; for there is a saving as thereafter expressed out of their general covenant, not to cut down, sell, or otherwise dispose of any timber, wood, &c., which saving, as it appears afterwards, relates to the planted wood; for as to that the lord covenants "that it shall be lawful for the tenants to cut down, use, and dispose of such wood, not only for repairing, &c., but also for any other their necessary uses." Therefore upon a liberal construction of this covenant in favour of those for whose benefit it was made, and upon comparing it with the more strict covenant applicable to the other wood, as well as upon the reason of the thing, it shall be intended that in respect of this species of wood the tenants were meant to have a more beneficial enjoyment. But secondly, admitting that to be otherwise, still the lord cannot maintain trover. Although the tenants right to cut down the planted wood was qualified as to the purposes for which they might cut it down, it was not qualified as to quantity; they might cut down the

whole for those purposes. And, therefore, *Holt* C. J. in *Ashmead v. Ranger* (a) took the distinction, that if *H.* have all the thorns in such a place for estovers, he may maintain trespass against any one who cuts them down, even against his grantor, but where *H.* hath only estovers to be taken in such a place, and the grantor cuts the whole, he may have case but not trespass. So here the tenant had all the planted wood upon her tenement for repairing and other necessary purposes, and might have maintained trespass even against the lord for cutting it down; therefore the property at the time of cutting was in her and not in the lord; and its subsequent misapplication by her will not vest the property in the lord. And this, as was said by *Lord Kenyon* in *Gordon v. Harper* (b), is not like the case of tenant for years, where if timber be cut down, the owner of the inheritance may maintain trover for it notwithstanding the lease, because there the only right of the tenant is to the shade of the trees when growing; and even in that case according to *Lawrence J.* (c), it was a long time in great doubt whether the landlord had such a possession on which he could maintain trover, but it was finally determined that he had, because the interest of the lessee in it remained no longer than while it was growing.

*LORD ELLENBOROUGH* C. J. Although the whole of the planted wood is the fund out of which the tenant is entitled to cut down, and he might maintain trespass against a stranger who cut them down, yet if he being only entitled to cut them as estovers, cuts them down for aliene purposes, the lord will be entitled. As soon

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(a) 2 *Salk.* 638.(b) 7 *T.R.* 11.(c) *ibid.* 13.

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as the tenant cuts down for a foreign purpose, his right determines and the lord's right commences. Now here the tenant's right to cut is for repairing and for any other necessary uses; and can it be argued to be for a necessary use when the tenant cuts down, not for any botes, but for a purpose perfectly aliene? It seems to me that it cannot; and therefore by the cutting the tenant's right determined. As to the rejection of the evidence; reputation is certainly out of the question, because the tenants right could only arise by some grant or deed; but as to the rest, I own my impression would have been to have admitted it, though I should probably have advised the jury that it was not of much weight against the plaintiff's evidence; but still if there be any species of grant, which being presumed, would have authorized the tenant to deal with the wood as she has done, she ought to have had the benefit, whatever that may be, of the evidence.

BAYLEY J. Suppose it had appeared that a succession of tenants had been cutting down considerable quantities of the wood with the knowledge of the lord, would not that have raised a presumption of a grant from the lord to that extent.

DAMPIER J. Under the agreement, certainly the tenant could only cut for her own use and not for the purposes of sale; but I am afraid the other evidence was admissible, though perhaps its effect when opposed to the plaintiff's evidence would not have been great.

*Per Curiam,*

Rule absolute for a new trial.

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The KING *against* The Inhabitants of KILBY.Wednesday,  
May 11th.

UPON appeal against an order, removing *John Norton*, his wife and child from *Kilby* to *Great Wigston*, the sessions for the county of *Leicester* discharged the order, subject to the opinion of this Court on the following case:

The pauper was born at *Kilby*. His father died when the pauper was four or five years old, and the parish relieved the widow with two shillings *per* week till he was nine years old; at which time the parish officers wished to put the pauper out apprentice, but the widow objected on account of his age. In consequence of her objecting the parish officers took off the two shillings *per* week, and refused to give her any more relief. When the pauper was about 11 years old, the widow being no longer able to support him, and his younger brother, and the parish refusing to relieve her until the pauper was put apprentice, went to the parish officer and told him she would consent, that her son should be put apprentice. He bid her chuse a master, and she chose one *Dand* of *Great Wigston*, to whom the parish officer agreed to give three guineas in money, and other things to the amount in the whole of 4*l*. The parish officer, the pauper, his mother and *Dand* met together, proposing to have the boy bound before the justices, and went before them for that pur-

Where the parish officers wishing to put out a child of the age of nine years as apprentice, upon the refusal of his mother withdrew her parish allowance, but two years afterwards she not being able to support him went to the parish officer and consented to her son's being put out and by desire of the parish officer chose a master, to whom the parish officer agreed to give three guineas, &c., and afterwards all the parties met and went before the justices, who thinking that the master had already a sufficient number of apprentices, refused to bind the son, whereupon the parish officer, declaring that if he could not have him bound there he would elsewhere, took the parties to

an inn, and procured an indenture, which was filled up and executed, and the son with his mother's consent bound himself for seven years: Held that the sessions were not warranted in finding fraud so as to defeat the settlement under the indenture.



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pose; but the justices, finding upon examination that *Dand* had as many apprentices as they thought he could do justice to, would not let him have any more. The parish officer then declared if he could not have him bound there, he would have him bound in another place, and accordingly took all the parties to an inn, procured an indenture stamp, which was regularly filled up and executed, and the pauper with the consent of his mother bound himself to *Dand* for seven years. The premium three guineas and the other things making up the 4*l.* were to be delivered to *Dand* at the expiration of six weeks from the execution of the indenture, at which time *Dand* went to *Kilby* and received them of the parish officer. The duty paid was 1*s.* 6*d.*, being 6*d.* in the pound upon the 3*l.*, and all expences of binding were paid by the parish. The pauper served *Dand* in *Great Wigston* a sufficient length of time to gain a settlement if the binding were good. The sessions founded their judgment on the ground of fraud upon the above facts.

*Dayrell* and *Gurney* in support of the order of sessions contended that what had been done by the parish was in evasion of the stat. 43 *Eliz.* which directs the parish officers with the assent of two justices to bind, &c. and that if this could be permitted, all the good effects of that statute would be defeated. This was the mere act of the parish officer forced upon the parties themselves by his withdrawing the parish allowance, and therefore, as it regarded them, done under constraint and not of their free will; and it was also in defiance of the judgment of the justices who are appointed by  
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the statute to approve in these matters. Accordingly in *Rex v. Hamstall Ridware* (a), Lord Kenyon said, that it was one of the most serious subjects that fell under the cognizance of the justices; who ought to judge of the fitness of the persons to whom poor children are apprenticed, and not the overseers. It is clear that this was intended to be a parish binding if the justices had assented; it was effected with parish money, and at the parish expence; and now that the justices have disapproved the act intended, it shall not be referred to one which was not intended, but shall remain, that which it really is, an imperfect parish binding; otherwise it would be competent at any time for the parish officer to supersede the statute.

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*Reader* and *Beaucherk* contra, maintained that this indenture was a legal instrument in itself, and the misconduct of the parish officer would not prevent its legal effect to confer a settlement; if the parish officer had acted illegally he might be indicted. So in the case of a marriage obtained by the fraud of the parish officers, they may be indicted for it, but the fraud has never been held to defeat the settlement.

LORD ELLENBOROUGH C. J. This does not appear to have been intended to be a binding as a parish apprenticeship; if it did, it might be defective. But it is independently of the statute a binding with the consent of the mother, the son, and the master. The justices have indeed found fraud, but there are no circum-

(a) 3 T. R. 381.

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stances to warrant such a conclusion, except that when the parties could not obtain the binding before the justices, they went elsewhere, and perfected it in another way. It is said this was the parish money, and perhaps there has been a misapplication of it, but still there has been a valid binding, for the pauper with his mother's consent binds himself. If the mother had been a party to the indenture, and the action had been brought against her upon it, I do not see how she could have effectually pleaded *per fraudem*, or *per minas*.

LE BLANC J. It appears that the mother chose the master, and it is not stated that the child was of an age not fit to be bound apprentice.

BAYLEY J. After the allowance was withdrawn, the mother might have obtained relief by application to the justices, if she had been entitled to it.

*Per Curiam*,

Order of Sessions quashed.

Wednesday,  
May 11th.

The KING against The Inhabitants of WILBY.

The mother of an infant copyholder under 14, was holden to be guardian by law of the copyhold, there being no custom of the manor for appointing

a guardian, and therefore entitled to reside irremovably on the estate. A grant of parcel of the waste of the manor to hold to *B.* and his heirs by way of increase to his copyhold, by such services as the copyhold was subject to, for which *B.* paid a fine of 10s, was held not to enure as copyhold, there being no custom to warrant such grant nor as an estate in fee-simple.

*Quare* if separate purchases may be added together, to make one purchase of 30l. within stat. 9 G. 2. c. 7. s. 5.

UPON appeal against an order of two justices removing *Mary Ann Bedwell*, the widow of *John Bedwell* and their children, *Mary* aged 14, *John* aged 11, and others under that age, from *Debenham* to *Wilby*, both in the county of *Suffolk*, the sessions con-

firmed

firmed the order except as to the youngest son, subject to the opinion of this Court on the following case :

In 1794, *John Bedwell* a settled inhabitant of *Wilby*, went with a certificate to reside in *Debenham*. In 1807, he purchased of one *Smith* a copyhold estate, holden of the manor of *Bloodhall* in *Debenham*, for which he paid 25*l.* to *Smith*, 2*l.* for a fine to the lord of the manor, and 2*l.* 3*s.* for steward's fees, which regularly would have amounted to 3*l.* 10*s.* 6*d.*, but the steward remitted 1*l.* 7*s.* 6*d.* in consideration of his circumstances. Afterwards in 1809, *Bedwell* made a conditional surrender of the said estate to secure the sum of 40*l.* In 1811 a piece of ground 20 feet in length and 12 in breadth, parcel of the waste of the before mentioned manor was granted to *Bedwell*, to hold to him and his heirs, by way of increase to his copyhold messuage and hereditaments, holden of the lord and lady at their will, by such fealty, suit of Court and other services, as the copyhold messuage and hereditaments were then subject to; for which he paid 10*s.* for a fine to the lord, and 1*l.* 6*s.* for fees to the steward. The aggregate sum which he paid for the whole of these premises, (including fines and fees,) amounted to 30*l.* 19*s.*, and he was proprietor of them until 1813, when he died intestate. After his decease, his widow and family continued to reside on the premises for the period of 143 days, and until their removal by the present order. No instance appeared on the rolls of any actual assignment of dower; but it was usual for *femes-covertes* to join with their husbands in securities (a) of estates possessed by such husbands in their own right within the said manor,

(a) Securities was the word stated in the case, but perhaps surrenders by way of security would be more correct.

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though never expressly stated in bar of dower; and the pauper had actually joined with her husband in the before-mentioned conditional surrender of these premises. By the custom of the manor, all copyholds holden of the manor descend to the youngest son.

*Marryat* and *Storks*, in support of the order of sessions, contended on a former day, that the stat. 9 G. 1. c. 7. s. 5., which restrains the gaining of settlements by estates acquired by purchase for less than 30*l.*; meant a purchase amounting to 30*l.* made at one time, and therefore two separate purchases made at several times, each being of less amount, could never be tacked together so as to form one purchase of the full amount; more especially, where it appeared that the first purchase had been mortgaged before the last was acquired. Separate tenements taken at different times, may indeed be added together so as to form one tenement of the aggregate yearly value of 10*l.*, and the renting of them will confer a settlement, but then there must be a renting of all at the same time; but the same rule will not apply to separate purchases, and therefore if they may be joined, any number of purchases for the most trifling consideration might be made from time to time, until the whole amounted to 30*l.*, and that would confer a settlement, though they were parted with as soon as made, and the party never held at the same time more than one of them. But that would be directly against the statute which restrains any person from gaining a settlement by virtue of any purchase of any estate, whereof the consideration for such purchase does not amount to 30*l.* 2dly, Supposing these purchases may be joined, still the aggregate considera-  
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tion did not amount to 30*l.* The steward's fees cannot make a part of the consideration; for they are nothing more than the expences of the conveyance; and it might as well be argued that a demise at the yearly rent of 9*l.* is a demise at 10*l.* 10*s.*, because the demise is written upon a 30*s.* stamp; but the act means by the consideration for the purchase, that which passes from the purchaser to the seller only. And though in *St. Paul's Walden v. Kempton* (a), the fees paid to the Court, formed part of the price of the copyhold tenement, it does not appear that that was made an objection, but the case was decided upon another ground. If the widow's right to dower should be set up as giving her a settlement during her quarantine; the answer is, that in respect of the copyhold, she could have no such right without a special custom, and no special custom is stated; and as to the waste, if the grant of it be not good as copyhold, it cannot be good for the inheritance, or for more than an estate at will.

*Nolan* and *Eagle*, contra, admitted that if the husband had parted with his first purchase before he acquired the last, that would have made a difference. But here it appeared that the surrender was only conditional, and so far from divesting him of his estate, that upon his death, it has descended to his customary heir. Therefore he was in possession of this as well as the other purchase to the time of his death; and if the word tenement comprehends several takings if they be holden together, why may not purchase include as much? It cannot mean that the estate must be created

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(a) *Foley*, 254 3d ed.

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by one and the same act, or vest at one and the same time. Suppose *A.* purchases of joint-tenants or tenants in common for a valuable consideration, and one of them conveys to him his estate at one time, and the other at another time; or suppose *A.* purchases an equity of redemption, and afterwards the mortgagee releases to him the estate; would not each of these be purchases capable of conferring a settlement, and yet none of them would accrue at the same time or by the same act. Then as to the including the fees in the consideration, the case of *Paul's Walden* is a direct authority to that point, for it states, that with the fine and fees the consideration amounted to 30*l.*; and the purchase was held good to confer a settlement. As to the widows' right of dower, it is not claimed as freebench, for that certainly must be by custom; but in respect of the waste, which though granted to hold as copyhold, cannot enure as a grant of copyhold without a special custom to warrant it (*a*), because copyhold cannot be created at this day; but, nevertheless, being to hold to the grantee and his heirs, it shall enure as a grant of the inheritance, of which the grantee dying seised, his widow became dowable. But if, as it has been objected, the grant cannot have that effect by reason of its being an insufficient conveyance to pass the freehold, then, lastly, the pauper has gained a settlement by residence on the copyhold, as guardian for nurture to the infant, to whom the copyhold has descended. In *Rex v. Oakley* (*a*) it was considered that the residence of guardian in socage had that effect; and in *Lutw.* 1190. the Court agreed that the lord cannot grant the guardianship of his infant copyholder, with-

(*a*) *Rex v. Newman* 2. Wils. 125.

(*b*) 10 *East*, 491.

out

out special custom; and 2 *Roll's Abr.* (a) "if a copyhold descend to an infant within the age of 14, his *prochein amy* to whom the land cannot descend, shall have the custody of the copyhold, as well as the freehold, unless there be a custom appointing it to another." So that it appears the mother, as guardian for nurture of her infant, was guardian of his copyhold, there being no custom, by the same rule that she would have been guardian of his freehold; and as to the freehold the rule is, according to *De Grey C. J. in Goodtitle v. Newman* (b), that she has a right to the possession as being guardian by law, namely, the person next in blood to whom the inheritance cannot descend. And a guardian need not be assigned." Therefore this case falls within *Re v. Oakley*.

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In the course of the argument the Court agreed, that without a custom the second grant could not enure as a grant of copyhold, by reason of the statute of *Quia Emptores* (c), neither was it good as a conveyance to pass an estate of inheritance, which can only be by feoffment, lease and release, &c.; therefore the pauper had not any claim to dower; and at the conclusion Lord *Ellenborough C. J.* said that the point last argued, viz. whether the mother was guardian by law to the copyhold of the infant, was the only point; and upon that the Court would take time to consider. *Cur. adv. vult.*

Afterwards on this day his lordship said that the Court had looked into the cases, and particularly *Egleton's case* (d) and that it seemed to them that the

(a) 40 tit. *Garde P. Com. Dig. Copyhold E. ibid. (K. 5.)*

(b) 3 *Wils. 528. Goodtitle v. Newman.*

(c) 18 *Ed. 1. c. 1.*

(d) 2 *Roll. Abr. 40. Garde. P.*

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mother was the guardian of the infant's copyhold, and as such was entitled to occupy the same irremoveably. He added that there were several authorities grounded on *Egleton's* case.

Orders quashed.

Wednesday,  
May 11th.

CORNFORTH *against* RIVETT.

In assumpsit for goods sold and delivered, defendant may set off money due upon plaintiff's acceptance, of which defendant has become holder since the sale, and before delivery of the goods, though he has agreed to give plaintiff ready money for them.

**A**SSUMPSIT for goods sold and delivered, and the money counts. Plea, the general issue with a notice of set-off of 24*l.* 10*s.* due on a bill of exchange dated 13th of May 1813. payable at four months, accepted by the plaintiff and indorsed to the defendant. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last term, the plaintiff proved the sale of the goods on the 15th of *September*, the delivery on the 16th, and that he and his attorney on the 17th or 18th went to the defendant to demand payment of 28*l.* 10*s.* being the price of the goods. The plaintiff told the defendant his situation was very precarious or he would not have sold them so cheap, but he was to have ready money. The defendant did not deny that, but answered that he would pay 4*l.*, and that he had a bill of the plaintiff's for 24*l.* 10*s.* For the defendant the bill of exchange as stated in the notice of set-off was produced and proved which it was admitted had come to his hands between the sale and delivery of the goods, and the defendant claimed to set it off. It was objected for the plaintiff that as the payment was to be in ready money the set-off ought not to be allowed; and his lordship doubting

doubting whether if this had been a plea of set-off it might not have been good by way of replication to have pleaded the agreement to pay in ready money, directed the jury to find the whole sum, giving the defendant liberty to move to reduce it to 4*l*.

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*Comyn* accordingly obtained a rule nisi, and cited *Eland v. Karr* (a) where such a replication had been disallowed upon demurrer.

*Park and Barrow* shewed cause and argued from the circumstance of the bill's coming to the hands of the defendant after the sale, that it was not obtained *bonâ fide*, but in fraud of his agreement for the mere purpose of setting it off; which they said was a presumption strongly fortified by the coincidence of the time when the goods were delivered with the time of the bill's becoming due. It was a fraud on the plaintiff who had contracted to sell his goods at a reduced price on account of receiving ready money. And if the plaintiff might have replied this agreement to a plea of set-off, surely he shall not be precluded by the form which the defendant has adopted, but shall have the same advantage under the general issue upon a notice of set off that he would have had by replication to a plea of set-off.

LORD ELLENBOROUGH C.J. The way in which it has struck me is this, that the plaintiff should have resisted the taking away of his goods without ready money, which he would have had a right to do by his agreement. But by suffering the defendant to have them without

(a) 1 *East*, 375. See 16 *East*, 138. per Lord Ellenborough C.J.

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payment he has receded from his agreement; he should consistently with his own stipulations have detained the goods. If he once parts with them on credit he lets in a set-off. Still the set-off may not be good though he has sold upon credit; and supposing it could have been shewn here that this bill was really the bill of another person put into the hands of the defendant to set off against his debt, that might have presented a different question.

LE BLANC J. This was the plaintiff's own acceptance which had arrived at maturity when the goods were delivered.

The *Attorney General* and *Comyn* were in support of the rule.

*Per Curiam,*

Rule absolute on delivering  
up the bill.

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The KING *against* The Inhabitants of the  
County of KENT. (a) *Thursday,*  
*May 12th.*

**I**NDICTMENT for not repairing *Footscray* bridge in the common highway over the river *Cray*. Plea, that long before the time of erecting the bridge, in the same place and part of the river where the bridge was afterwards erected, there was, and from time immemorial until the deepening the water hereinafter mentioned, had been a public highway through a ford in the said river for the subjects of the King with their cattle and carriages, and that certain persons afterwards and before the erecting the bridge, to wit, on the first of *January* 1767, did erect in and across the river a certain mill, dam, and works appertaining thereto, and did thereby *for their own profit*, and for the working of the said mill, obstruct and deepen the water in the same place, and part of the river where the ford and highway before then was, and had been for all the time aforesaid, and where the said bridge was afterwards erected, and did by such deepening of the water destroy the ford and render the highway wholly impassable; and it then and there became, and was necessary for the passage of the subjects of the King with their cattle and carriages, and the duty of the said persons, to erect a bridge at the same place over the river; whereupon the said persons afterwards, to wit, on the first of *December* in the year aforesaid, did first erect the said bridge in

Where a person about 45 years back erected a mill and dam there to for his own profit, *per quod*, he deepened the water of a ford through which there was a public highway, but the passage through which was, before the deepening, very inconvenient at times to the public, and the miller, afterwards built a bridge over it, which the public had ever since used: Held that the county and not the miller were chargeable with the reparation.

(a) Cause was shewn against the rule at *Serjeants' Inn* before last *Hilary* term.

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the same place, and part of the river, where the ford and highway, before the deepening of the water of the river, was and had been for all the time aforesaid, and instead of the highway and ford, as a convenient, fit, and useful means of passage for the subjects with their cattle and carriages over the river, and the said highway was altered from its ancient course through the ford; unto and over the bridge, and has so continued. It then averred, that *B. Harenc* was, and still is owner and proprietor of the mill, dam, and works, and that the proprietors of the mill, ever since the erecting thereof, have kept and continued the mill, dam, and works, and have kept and continued the water so obstructed and deepened, and that *B. Harenc* did, and still does keep and continue the water so obstructed and deepened. By reason of which premises, the owners and proprietors of the mill, dam, and works, from the time of the bridge's being erected, have repaired, and been liable to, and ought to repair, and *B. Harenc* still ought to repair.

Replication that the inhabitants of the county ought to repair.

At the trial before Lord *Ellenborough C. J.* at the last *Summer* assizes for *Surry*, it appeared, that before the mill was built, which was about forty-five years ago, there was a ford through the river where the bridge now stands, which was a part of the highway from *London* to *Maidstone*. It was very deep; at flood times up to the middle, and at ordinary times to the knee, and in frosty weather was very unsafe for the public. After the mill was built, the water was increased, but it did not appear to any greater extent than about three inches.

The miller about five years afterwards built the bridge, and there was no doubt that the public had since used it (a). A verdict was found for the crown; and leave was reserved to the defendants to move for a new trial.

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*Taddy*, in *Michaelmas* term, obtained a rule nisi on the ground, that there was a continuing liability in the owner of the mill to repair the bridge so long as the obstruction to the passage through the ford remained. And he compared it to the liability arising in respect of inclosure; and also referred to *Rex v. Inhabitants of Kent* (b), where a similar plea to the present was holden well, but he admitted that was upon the construction of a private act of parliament. He likewise cited 1 *Roll. Abr.* 368.

*Marryat* shewed cause, and assumed that thus much was admitted and proved by the plea and evidence, viz. that this bridge had been used by the public, and was a convenient, fit, and useful means of passage for them, and that its erection had removed an inconvenience which before then the public sustained. Therefore he concluded the question to be, whether under these circumstances the county shall not be liable to the reparation, although the bridge was, in the first instance, erected for private convenience, or whether by reason that private convenience was connected with the public good, that shall make the individual liable. And he distinguished this case from 1 *Roll. Abr.* 368., because there it was not

(a) It did not appear by evidence at the trial who had repaired the bridge, but upon the argument, it was admitted on the part of the crown that the miller had.

(b) 12 *East*, 220.

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stated that the building of the bridge removed any previous inconvenience which the public suffered; but the inconvenience was wholly created by making the new cut, and the bridge was only to remedy that inconvenience, and place the public in *statu quo*. But it does not follow from thence, that in every case where a person erects a bridge for his own benefit, he shall be chargeable with its reparation. On the contrary, it was resolved long ago in *Regina v. Inhabitants of Wilts (a)*, that “if a private person builds a private bridge, which afterwards becomes of public convenience, the whole county is bound to repair it;” and *Northey* is reported *(b)* to have cited a case wherein it was adjudged to that effect. And that has been acted upon since in the *Glusburne* bridge case *(c)*, in *Rex v. Inhabitants of W. R. of York (d)*, and in *Rex v. Inhabitants of Glamorgan (e)*; in the latter of which the bridge was originally built by an individual for his private advantage, and had been constantly used by him, and continued to be necessary for the carrying on his works. Also in Lord *Portmore’s* case *(f)*, the individual benefit was joined with the public convenience. And as to the *Medway* canal case *(g)*, the answer has already been given, that the company were only empowered to act under the condition of leaving a way for the public, and as they were bound to leave a way, it followed that they were bound to maintain it.

*Taddy* and *Berens* contra, denied that the mere use of the bridge by the public was enough to cast on the

(a) 6 *Mod.* 307. 4th resolution.

(c) 5 *Burr.* 2594., 2 *Blac. R.* 685.

(e) *Ibid.* 356. n. (f) 13 *East*, 225.

(b) S. C. 1 *Salk.* 359.

(d) 2 *East*, 342.

(g) 13 *East*, 220.

public the burthen of repairing it. On the contrary they said, that as the bridge originated in a wrongful act, and for private benefit, notwithstanding the public had used it, they should not be deemed to have adopted it so long as the private benefit continued. And therefore *Aston J.* in the *Glusburne* bridge case (*a*), adverting to the case in *Rol. Abr.* took the distinction, that there the private emolument continued to the person who erected it, and it was not reasonable for him to make the county contribute to it, whilst the private benefit continued to himself. And Lord *Ellenborough C. J.* also recognized the same distinction as governing the case in *Rol. Abr.*, for he said, "that was a case where the party was guilty of a nuisance in the first instance, in making a new cut across the highway, which the public might have prevented, and all along he continues it for his own benefit (*b*).” And he farther observed, "that *Aston J.* in his judgment said nothing about the adoption of it by the public; and that there was good sense in not relying on that, except as evidence of its being a public bridge, and of utility to the public.” It cannot make any difference that here the passage through the ford was an inconvenient passage to the public, because the county was not bound to remove that inconvenience, but might have treated the bridge as a nuisance; and therefore being a nuisance that has been continued by sufferance for individual advantage, the individual shall be liable so long as that advantage remains. In like manner the language of Lord *Hardwicke* is, "that a party may by inclosing part of the way on the one, or on both sides, be liable to the repair of the

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(*a*) 5 Burr. 2597.

(*b*) 2 East, 349.



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whole, or of part. And that is only a temporary charge till the inclosures are thrown open (a)." The same law will be found in *Rex v. Stoughton* (b), 1 *Roll. Abr.* 390., and 1 *Hawk. P. C. c.* 76. s. 7.

At the conclusion of the argument, Lord *Ellenborough* C. J. said, that independently of the case in *Roll. Abr.*, he should have no doubt that in strict conformity with the *Glusburne* bridge case, and the other cases, the county was liable; but as that case was brought forward so much, it would be very material to have an inspection of the record, as well as to look at the *Langforth* bridge case (c), which had been mentioned by *Dampier* J.

*Cur. adv. vult.*

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court in substance as follows:

After stating that this was a motion for a new trial upon an indictment for not repairing a bridge, and recapitulating the pleadings, His Lordship said, the facts proved at the trial corresponded in substance with those alledged in the plea. But being of opinion that by the stat 22 H. 8. the county was liable to repair all public bridges in the county, unless they could shew that others were liable by prescription or by reason of tenure, I directed the jury to find a verdict against the defendants. On the argument, the Court was pressed by the case from 1 *Roll's Abr.* 368. "If a man erect a mill for his own profit, and make a new cut for the water to come to it, and make a new bridge over it, and the subjects use to go over this as over a common bridge,

(a) *Ambl.* 295.

(b) 2 *Saund.* 160.

(c) *Cro. Car.* 365.

this

this bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit." Lord *Rolle* cites the 8 *Ed. 2.* as adjudged in *B. R.* for *Bow* bridge and *Channel* bridge against the Prior of *Stratford*. As that case seemed to constitute an anomaly in the law, and to be at variance with all the cases, though it was attempted by *Blackstone J.* in 5 *Burr.* 2594., the *Glusburne* beck case, to be reconciled with it, on the distinction between an obligation to repair and an obligation to erect, founded on the words of *Magna Charta*, c. 15.: "Nulla villa nec liber homo distringatur facere pontes," (which distinction, however, does not seem to be well founded,) and as we were desirous of seeing what manner of obligation was stated, and of inspecting that record, the Court directed a diligent search to be made, and the record has been found in the chapter-house at *Westminster*. It is not necessary to state the whole proceedings which run to a considerable length. The record begins with a commission directed to certain persons, to inquire who ought to repair the bridges and causeways between *Stratford Bow* and *Ham Stratford*. It appears from the return which is continued to *Easter term 9 Ed. 2.*, that they had originally been built as an act of charity, by the Lady *Matilda* then Queen of *England*, who must have been the wife of King *Stephen*, and not the Empress *Maud*, as on first view I thought, who bought certain lands, &c. for the reparation of the said bridges, &c.; that she gave the said lands, &c. to the Abbess of *Barking*, on condition that she and her successors should repair the said bridges. The Abbess of *Barking* granted them to the Abbot of *Stratford* on the same condition, and also at a yearly rent of four marks

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in silver. It is unnecessary to go through the whole record, which, however, contains matter of great curiosity. It is enough to state that the Abbot and Abbess being impleaded on a charge by reason of tenure in 9 *Ed. 2.*, arranged the dispute by concord. The Abbot and Prior, Proctor and Celarius, came and acknowledged their signature to an agreement with the Abbess, by which they bound themselves to the King and the Abbess for ever to repair the bridges, &c. The words of concord are, that the King and his heirs may distrain the Abbot and his successors to the maintenance and repair of the said bridges and causeway, &c. Thus it appears, the real question was on an obligation to repair, by reason of the tenure of certain lands, and that no such question as supposed by Lord *Rolle*, that is, of a legal obligation resulting from the building of the bridge by the mill-owner for his benefit, was ever directly or indirectly decided, or could properly be argued. Laying that case out of the way, the authorities from first to last are uniform, and establish the case as cited by *Northey* Attorney General in *Rex v. Inhabitants of Wilts*, 1 *Salk.* 359., that if a private person build a private bridge which afterwards becomes of public convenience, the county is bound to repair it. The consequence of this is, that there must be judgment against the defendants. (a)

(a) We have been favoured with a copy of the record relating to the *Stratford* bridge case, and in compliance with the wishes of several gentlemen of the profession, we have subjoined it in the following note.

Copy from an Extract furnished the Court by  
Mr. Dealtry.

Pleas before the King of *Easter* term 6 *Ed. 2. Rot. 95.* King *Edward* the 1st, in the 31st year of his reign commanded *Roger le Brabazon*  
and

and three other persons to inquire who ought to repair the bridges and causeways in the king's highway between *Stratford Bow* and *Ham Stratford*, and about defect in the maintaining the repair of the same, who took inquisition thereupon by 12 jurors of the county of *Essex*, and 12 others of the county of *Middlesex*.

And they say, that the passage over the water of *Lea* at *Stratford Bow* antiently used to be in a certain place called *Oldford*, which is a mile distant from the place where the bridges and causeway now are, at which passage many passengers were at divers times drowned and put in danger.

And when afterwards notice of such great danger came to the Lady *Matilda* then Queen of *England*, she, *pietate mota*, directed inquiry to be made where bridges and a causeway might be better and more commodiously made for the utility and ease of the country, and the passengers, &c. Whereupon the said Queen caused to be built two stone bridges over the water of *Lea*, one at the town of *Stratford Bow*, and the other over another trench of the same water towards *Essex*, which is called *Channel* bridge, and a causeway between the two bridges, so that all passengers might pass well and securely.

And because the Queen wished that the said bridges and causeway, so built gratuitously, might for ever thereafter be maintained and repaired, she bought certain lands, rents, meadows, and a water-mill called *Wigge Mulne*, and constituted and ordained them for the maintenance and reparation of the said bridges and causeway.

And because she hoped that the maintenance and reparation aforesaid would be better and more securely performed by religious persons, if they were charged therewith, than by seculars, lest such secular persons and their heirs by lapse of time might happen to fail, and there was not then any religious house nearer to the said bridges and causeway than the abbey of *Barking*, (because the abbey of *Stratford* was not then founded,) she gave the said lands, rents, and meadows and mill with the appurtenances to the then abbess of her house at *Barking*, so that she and her successors, &c. should repair and sustain the said bridges and causeway, when it should be necessary, for ever.

But afterwards *Gilbert de Mountfichet* founded the abbey of *Stratford*, and because the abbot of the same house acquired the lands, &c. from the said abbess because they were near to his abbey, and were situated conveniently for his house, doing (as he and his successors) the repair and maintenance of the said bridges and causeway for the said abbess and her successors, and her house of *Barking*, &c. and rendering to them besides four marks of silver per annum.

And they say, that the said abbot for sometime repaired the said bridges and causeway, by reason of the said tenements and the scite of the mill aforesaid, and afterwards assigned one *Godfrey Priat* to do the repair and maintenance thereof in the name of him and his house, and for that purpose delivered to him horses and a cart, and made a house for him on the causeway, and—*de abbatis sua de Stratford singulis diebus capiendum eidem per correctam suam dedit*, which *Godfrey* for a long time did these repairs and maintenance, but then

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then he often required assistance to this from certain passengers, by whose contribution they afforded him assistance, so that he acquired much profit thereby: which when the said abbot perceived, he said to the said *Godfrey* that he might do the said repairs and maintenance from such his perquisites, without any assistance from the said abbey, and wholly withdrew his contribution: whereupon the said *Godfrey* afterwards collected a toll from several passengers, and caused staples and bars to be made upon the bridges, so that carriages and horses could not pass until they had paid the toll, unless they were magnates, whom he permitted to pass, and so the right and certain maintenance of the said bridges and causeway ceased.

They say also that three mills are situate upon the causeway towards the north, v.z. one a fulling mill by a master of the house of *St. Thomas de Acre*, which mill, and also the site of another mill the said master now holds.

And the other two mills by the keeper of *London Bridge*, viz. the one a water-mill called \_\_\_\_\_, and the other a fulling-mill called *Sprycman's Mill*, which two mills the keeper of the said bridge now holds; from which mills descend three courses of water with three trunks made across the said causeway by the said master and keeper for a long time after the said causeway was made: over which trunks three wooden bridges were made by the said master and keeper, which are in great want of repair.

They say also that one arch and almost another of the bridge at *Stratford Bow*, towards *Stratford*, are obstructed by one *Albert* at *Briggs*, and two others, who have built quays in the water of *Lea*, and obstructed the course of the water, by which the causeway in another part is much deteriorated by the diversion of the water from its right course.

It being inquired who are bound to repair the aforesaid three wooden bridges made in the causeway, they say as well they who hold the said mills founded and planted upon the said three trunks as the said abbot, who has the profit of the courses of water running under these bridges to the mill of the said abbot, situate on the trunks aforesaid, towards the north.

And they say, that the said abbot has the greater profit, because that the three mills aforesaid of the said abbot are nearly sustained by the said trunks, because these mills had no assistance of water without these trunks, whereby they might conveniently be sustained, unless by the reflux of the *Thames* at tides. And for that reason it seems to them that the said abbot is bound to repair and maintain two of the said wooden bridges, viz. towards *Essex*, and the said master and keeper the third of the said bridges towards *Stratford Bow*.

It being also inquired what tenements the said abbot holds of these tenements which the said Queen gave to the house of *Barking* for the repair of the said bridges and causeway, they say that he holds all these tenements. It being enquired for what time the said reparation has been withdrawn, they say that they are ignorant.

By reason of which said inquisition, it was commanded to the sheriffs of *Essex* and *Middlesex*, that they should cause to come before

before the King in 15 days of *Easter* the said Abbot of *Stratford*, to know if he can say any thing why he ought not to repair and maintain the said causeway and all the bridges, except one wooden one, according to the tenor of the said inquisition. And also to cause to come the said master and keeper, to shew why they ought not to repair the wooden bridge.

The abbot comes, and *John de Norton*, who prosecutes for the king, says, that the said abbot ought to repair the causeway and all the bridges, except the one wooden bridge which the master and keeper are bound to repair; for he says, that the said abbot and his predecessors have been used to repair them, and holds the lands, &c. for the repair and maintenance thereof.

And the said abbot says, that he is not bound to repair the causeway or any bridges between *Stratford Bow* and *Ham Stratford*, except a bridge called *Channel Bridge*, nor have he or his predecessors been used to repair them, nor hold any lands by which they are bound, and puts himself upon the country.

And the keeper of the aforesaid bridge says, that he is the keeper of *London Bridge* at the will of the mayor and commonalty, without whom he cannot answer, and prays aid, &c.

And the said master says, that inasmuch as it is found by the said inquisition, that he and the said keeper ought to repair a certain wooden bridge in common, he prays judgment whether he alone ought to answer without the said keeper. Wherefore it is commanded to the sheriffs of *London* that they cause the mayor, &c. to come; the same day is given to the said keeper.

And the sheriff of *Essex* is commanded to summon a jury between the king and the abbot.

And the jury being sworn say, that the abbot is not bound to repair the said causeway nor the bridges between *Stratford Bow* and *Ham Stratford*, but only one bridge called *Channel Bridge*, nor does the abbot hold, nor have his predecessors held any tenements for which they are bound to repair them; therefore it is considered that the abbot go without day.

Afterwards in *Michaelmas* term, 7 *Ed. 2.*, come the mayor and commonalty, and the master of the house of *St. Thomas de Acre*, and the keeper of *London Bridge*, and *John de Norton* who sues for the king says, that they are bound to repair the said causeway and bridges as by the inquisition is found, which they deny, and thereupon issue is joined.

And the king commands the sheriff of *Essex* also to summon the Abbess of *Barking*

In *Hil.* term 7 *Ed. 2.* she comes and says, that she is not bound to repair and maintain the said bridges and causeways, nor did she or her predecessors take any lands for the reparation or maintenance thereof.

And thereupon issue is joined, and a jury summoned as well of *Essex* as of *Middlesex*. And in *Trin.* term 7 *Ed. 2.* the abbess challenges all the jurymen, and departs the Court in contempt of Court.

And in *Trin.* term *Ed. 2.*, the king's attorney and the abbess appearing, the jury find that Queen *Matilda* caused to be made the two

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the Abbot.

N.B. The in-  
quisition does  
not charge  
them with the  
causeway, nor  
with any but  
one wooden  
bridge.

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The inhabitants of  
KENT.

two bridges and causeway as found by the inquisition and bought the lands, &c. for their repair, and gave them to the abbess, that she and her successors might keep them in repair, and that the present abbess, by reason of her tenure of those lands, &c. ought to repair and maintain the said bridges and causeway. And the sheriff is commanded to distrain her.

And as to the master of the house of *St. Thomas de Acre*, and the keeper of *London Bridge*, they say that there were three trunks made across the said causeway by the said master and keeper after the said causeway was made by the said queen, upon which trunks there are three wooden bridges made in the said causeway by the said master and keeper by which the said causeway is much deteriorated.

Afterwards in *Easter term* 9 *Ed. 2.* the abbot and prior proctor and cellarius of *Stratford* come and acknowledge their signature to an agreement with the Abbess of *Barking*, by which they bind themselves to the King and to the Abbess for ever, in future to repair the bridges and causeway, and to keep the Abbess and her successors discharged from the repair, for which the Abbess paid them 200*l.* of silver, saving the rent of four marks due to the Abbess. Dated *Friday post festum Palentine* 1315, 9 *Ed. 2.* And they *concesserunt*, that the king and his heirs and their ministers may distrain the Abbot and his successors by all their possessions spiritual and temporal, to the maintenance and repair of the said bridges and causeway, and that they will keep the Abbess and her successors indemnified.

### Short Abstract of other Records about the same time, relating to the same subject.

*Trin. T.* 7 *Ed. 2.*

(Rot. 55. in *Dono.*) The King's writ is sent to the justices to inquire of those who obstructed the water of *Lea* by building one arch and a half of the bridge at *Stratford Bow*, by which the causeway beyond the bridge was deteriorated for 30 feet.

Same term.

(Rot. 80.) The Abbess of *Barking* impleads the Abbot of *Stratford*, and the tenants of the lands appointed for the repair of the bridges, to shew wherefore they do not exonerate her.

*Hil.* term  
8 *Ed. 2.*

(Rot. 72.) The Abbess of *Barking* impleads the Abbot of *Stratford*, and other persons who hold part of the lands, charged with the repair of the causeway and bridges, to shew cause why they do not keep her indemnified.

Same term.

(Rot. 99.) She impleads the tenants of the lands, and they not appearing, process of attachment is awarded against them.

On Rot. 72. is entered a transcript of the agreement entered into between the Abbess of *Barking* and Abbot of *Stratford* as hereinbefore stated.

*Ed. 2.* succeeded to the throne the 7th July 1307,

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DOE, on the demise of SCHOLEFIELD and Others,  
against ALEXANDER.

Friday,  
May 13th.

**EJECTMENT** on a proviso contained in a lease for re-entry for non-payment of rent.

At the trial before Lord *Ellenborough* C. J. at the *Middlesex* sittings after last term, it appeared, that by the lease the rent was reserved quarterly, with a proviso, that if the rent should be unpaid 21 days next after any of the days of payment, (*being lawfully demanded*,) the lessor should have a right to re-enter. There were five quarters' rent in arrear, and no sufficient distress upon the premises; but it was not proved that there had been any demand. His Lordship thought that where it was expressly provided by the lease, that the rent should be demanded, the stat. 4 G. 2. c. 28. did not relieve the party from the obligation of making a demand; and, consequently, a demand not being proved, the lessor was not entitled to re-enter; but he allowed the plaintiff to take a verdict, giving leave to the defendant to move to enter a nonsuit upon this point.

Upon a lease reserving rent payable quarterly, with a proviso, that if the rent be in arrear 21 days next after day of payment, (*being lawfully demanded*), the lessor may re-enter: Held that five quarters being in arrear, and no sufficient distress on the premises, lessor might re-enter without a demand. Dissentient Lord *Ellenborough* C. J.

Accordingly, *Littledale* obtained a rule nisi for that purpose; and cited the opinion of Lord *Mansfield* in *Goodright v. Cator* (a), that the meaning of the 4 G. 2. was certainly only this, that where there is no stipulation in the lease for entry without demand, you may, notwithstanding, enter without demand, provided six

a) Doug. 477., 4th ed.

months'



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—  
Doe  
against  
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months' rent is in arrear, and there is not a sufficient distress.

The *Attorney-General* and *Marryat* shewed cause, and contended that since the statute the party was entitled to enter, as well where there is a stipulation in the lease for re-entry on demand, as where it is for re-entry simply; provided half a year's rent was due and no sufficient distress. And they said the reason was, because the statute was intended to dispense with the niceties attending a demand of rent at common law, in all cases where before the statute those niceties were necessary to be observed in order to entitle the party to re-enter; and as before the statute the party could not have re-entered without a formal demand, whether the lease stipulated for re-entry simply, or for re-entry with a demand, therefore the statute shall be intended to dispense with those niceties in the one case as well as in the other. Accordingly, in *Doe v. Wandlass* (a), which was ejectment upon a proviso for re-entry, in case of non-payment of rent, Lord *Kenyon* said, that "at common law great niceties were required in such a case, and it was to do away the necessity of complying with those requisites that the act of parliament was passed." And if, as that case shews, the law will imply that a demand must be made, although a demand be not expressed in the lease, it follows, that there is no difference in this respect, whether a demand be expressed or not; and then the statute steps in to aid those cases wherever a demand was necessary by the common law, by substituting service of a declaration in

(a) 7 T. R. 117.

eject-

ejectment, in place of a demand and refusal, provided half a year's rent is due, and there is no sufficient distress.

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against  
ALEXANDER.

*Littledale*, contra, admitted that before the statute, whether the lease stipulated for a demand or not, a demand was necessary according to the formalities of the common law; but he contended, that the statute was passed for the sole purpose of dispensing with those formalities, and not with any view of interfering with the agreements of parties; and, therefore, where the parties have agreed that there shall be a demand, a demand is still necessary, though since the statute it need not be a demand accompanied with all the formalities required by the common law. And by this construction, the Court will give effect both to the statute and also to the clear intention of the parties, who have expressly stipulated that there shall be a demand. Some demand, therefore, was still necessary in this case; though by reason of half a year's rent being due, and no sufficient distress, it is a case in which the statute would so far have aided, as to relieve the party from the strictness of a common law demand. If this be not the construction of the statute as it applies to this case, it is submitted that it does not apply at all. And so indeed Lord *Mansfield* thought in *Goodright v. Cator* (a), as appears by his language before cited, and also where he says, "that the clause of the stat. of *Geo. 2.* is very confused, and he thought it meant only to provide a remedy in cases of vacant possession, although other matters are thrown in." And it is observable, that the words of the statute are, "in cases where the landlord has a right of entry

(a) *Dow. 477.*

1814.

*Dox  
against  
ALEXANDER.*

for non-payment;" but here the landlord had not a right to enter for non-payment but only after demand. So that here, whether the statute applies or not, the landlord was not entitled to re-enter without a demand of some sort.

Lord ELLENBOROUGH C. J. The doubts which I entertained on the construction of this statute at a very early period of this cause, I cannot say are yet removed; but I do not know that the opinion which I have formed in the result is in concurrence with the rest of the Court. It appears to me, that the statute had in contemplation the inconvenience arising from the niceties required in making a demand at common law. The party was bound to go to the premises before sunset, and to make a demand at a particular time and in a particular form, which was necessary to be observed, either by posting up a notice, or making due proclamation. From all which operose business, the legislature, as it seems to me, meant to relieve the parties, and to cure the niceties attending a re-entry at common law, which was founded on a demand in the manner above stated. But here the party stipulates for a demand: he does not stipulate for a demand with all the necessary formalities of the common law; the stipulation does not relate to a demand of such nicety, but only that it shall be lawfully demanded, and I do not see why I must refer that to a demand as upon a re-entry at common law. To call it indeed a re-entry at common law, is, strictly speaking, incorrect. One would think at first reading the statute, that a right of re-entry on half a year's rent being in arrear was intended, but it afterwards goes on to add, "and that no sufficient

sufficient distress is to be found on the premises. But, as I observed, a right of re-entry at common law, such as this, did not exist, it is a right growing out of the contract of the parties. It is partly matter of stipulation, and partly at common law; and that appears to me to be the thing from which the legislature intended to relieve the parties, in respect of the great niceties which the law imposed. If the lease had stipulated that the party should be at liberty to re-enter for non-payment of rent simply, then if it had been before the statute, he must have pursued the forms which the common law imposed, but after the statute he need not. But where there is a stipulation in a lease after the statute that the rent shall be lawfully demanded, the party who so stipulates, knows that the demand need not be made according to the formalities of the common law, but still it makes a demand necessary; "lawfully demanded" does not now mean demanded with all the strictness of the common law, but an effectual demand. It appears to me, that the statute was not meant to remedy any case but that where a demand was to be made according to the course of the common law; but where parties by their own stipulations introduce the necessity of a demand, that stipulation is not made null by the statute, and of no effect, but a demand must still be made.

LE BLANC J. I confess I feel great difficulty in giving any other construction to the words "lawfully demanded" except that which is referable to a demand at common law, such as would be sufficient to authorize a re-entry. The act of parliament meant to remedy the difficulties which landlords were under in making a re-entry according to the formalities of the common

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 Doe  
*vs* against  
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law. For that purpose it meant to allow them, under certain circumstances, to serve a declaration in ejectment, and where there was no sufficient distress on the premises to recover possession without a previous formal demand. If the party had stipulated that the landlord should have a right to re-enter in case of nonpayment of rent, it is clear that before the statute the landlord must have made a common law demand, in order to entitle himself to re-enter. And where the statute meant to remedy that, it applies as well to cases where the party has expressed that the landlord shall re-enter after the rent has been lawfully demanded, as where that is omitted. The inclination, therefore, of my opinion is that this is a case within the provisions of the act, more than half a-year's rent being in arrear, and there being no sufficient distress on the premises, notwithstanding the introduction of the words lawfully demanded, and therefore the plaintiff is entitled to recover.

BAYLEY J. I cannot but distrust my own opinion when I find that it differs from that of my Lord on a point to which he has before given his attention. But it seems to me that this is a case remedied by the act. Before the act a party could not have recovered without a formal re-entry; a lawful demand was considered as essential; and therefore every clause of re-entry contained in effect, though not in terms, the words lawfully demanded. A lawful demand was on the day of the rent becoming due, and to be made about sunset. The legislature thought that was a difficulty imposed on landlords without being attended with any beneficial consequences to the tenant; that it was an

idle ceremony of form. And therefore the statute, after reciting the inconveniences, provides, that, in all cases where the landlord has a right of entry for nonpayment of rent, and half a year's rent shall be due, he may, without a formal demand, serve a declaration in ejectment. Then it goes on to provide, that in case of no sufficient distress on the premises, the lessor shall recover judgment in the same manner as if the rent had been legally demanded and re-entry made. It has been contended by Mr. *Littledale* that here the lessor had no right to re-enter, by reason of the words introduced into the proviso, that the rent should be lawfully demanded, unless he made a previous demand. But if before the statute those words were in substance contained in the common law proviso, though not expressed, I do not think that their being expressly stated since the statute will vary the legal effect of the proviso. And there is no inconvenience likely to result from this construction, because the service of the declaration in ejectment apprises the party what the lessor claims, and the party may come to the Court and apply to stay the proceedings on payment of the arrears of rent. I am aware it may be said, that that will put the party to expence, but the fault is his, in not being ready with his rent at the time. If the introduction of these words imposed the necessity of a demand notwithstanding the statute, I cannot understand what other description of demand would be sufficient, in place of a demand at common law. Nothing, as it seems to me, would have done in this case but a strict formal demand complying with all the niceties of the common law, supposing there had been a sufficient distress. If so I cannot put a different construction on this proviso, where there is

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a sufficient distress on the premises, and where there is no sufficient distress. For these reasons it seems to me that this case is the same as if there had been a legal demand of the rent.

DAMPIER J. I think there was no necessity for a demand of the rent on the premises. The right to re-enter grows out of the stipulation of the parties. A demand is necessary as a consequence of law, and there was the same necessity for a demand before the statute whether the lease contained the words "lawfully demanded" or not. Therefore the maxim applies *expressio eorum quæ tacite insunt nihil operatur*. Then the statute says, "in all cases when half a-year's rent shall be in arrear, and the landlord has a right of entry," the remedy shall apply, provided there be no sufficient distress. It strikes me that the same words in a proviso cannot have a different meaning since the statute from that which they had before the statute. No other demand is substituted by the statute for that which the law would have required before the statute where a demand was expressly provided for by the stipulation of the parties. It appears to me, this case falls within the same mischief that was intended to be cured by the statute, and that the words in the lease must mean such a demand as was required at the common law, and therefore the statute has dispensed with such demand.

Lord ELLENBOROUGH added at the conclusion, that his construction of the words "lawfully demanded," in the lease, certainly did not import a demand according to the strictness of the common law, but any demand whatever without reference to the common law.

Rule discharged.

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RIGHTLY *against* BIRCH.Friday,  
May 13th.

**A**CTION against the sheriff for a false return, the first six counts being in tort, and the four last in assumpsit, and there was a verdict for the plaintiff on the six first counts, and for the defendant on the four last. Whereupon it was moved in arrest of judgment that here was a misjoinder, and a rule nisi was granted. And now the rule coming on *Jervis* and *Gurney*, who were in support of it, contended that notwithstanding the verdict was entered on the six first counts only the misjoinder was not cured; and they referred to *Bage v. Bromuel* (a) where trover and assumpsit were joined, and upon non culp. a verdict for the defendant quoad the trover, and for the plaintiff quoad the assumpsit, and it was resolved by the whole Court that these two could not be joined, and though the jury had severed them yet the declaration being ill ab initio, the plaintiff ought not to have judgment, and so judgment passed quod nil capiat per billam.

If there be a misjoinder of counts, and a verdict for plaintiff on the counts well joined, and for the defendant on the others, the misjoinder is not a cause for arresting the judgment.

But the Court discharged the rule, Lord *Ellenborough* C. J. saying that the case referred to had had its day, and that it was time it should cease. (b)

(a) 3 *Lev.* 99. See also *Holmes v. Taylor*, 2 *Lev.* 101. S. C. T. *Reym.* 233.

(b) See *Eddowes v. Hopkins*, *Dougl.* 375. 3d ed. *Hancock v. Heywood*. 3 *T. R.* 433. *Williams v. Brendon*, 1 *Bos. & Pul.* 329.



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Tuesday,  
May 17th.CATHCART, Clerk, *against* HARDY. \*

The stat.  
43 G. 3. c. 84.  
which prohibits  
under a penalty  
a spiritual per-  
son from ab-  
senting himself  
from his bene-  
fice for more  
than a certain  
time in any one  
year, means  
year from the  
time when  
the action is  
brought for  
the penalty.  
In such action  
it is not neces-  
sary to allege  
in the declara-  
tion that the  
benefice has  
the cure of  
souls; and its  
being alleged  
that he ab-  
sented himself  
for a period ex-  
ceeding eight  
months toge-  
ther, (to wit,)  
on the 10th  
Oct. 1810 for  
the space of  
nine months  
then next  
following  
is sufficiently  
certain of the  
time of ab-  
sence, for it  
shall be in-  
tended to be  
for more than  
eight months  
immediately  
consecutive to  
the 10th Oct.,  
the jury hav-  
ing found a verdict for a penalty corresponding with that period of absence. The annual  
value means average annual value. A prebend is a benefice within the statute.

**E**RROR to reverse a judgment in an action of debt in the Common Pleas given upon the second and tenth counts of the declaration. The second count stated that *Cathcart*, after the passing of the 43 G. 3. c. 84. to wit, on the 19th of *August* 1809, and for a long time, to wit, for two years then last past, was and still is a spiritual person, and rector of the rectory of the parish church of *Methley*, in the county of *York*, and for and during all the time aforesaid possessed of the said benefice, and he so being such spiritual person, and also being possessed of the said benefice, and not regarding the statute, did after the passing of the same, without sufficient cause, as in or under any act or acts of parliament recited or mentioned in the said statute is specified, or such other sufficient cause as would exempt him from any of the pains, penalties, and forfeitures under the recited acts for any non-residence, and without having any such licence or exemption, as in the statute mentioned for that purpose, wilfully absent himself from his said benefice *for a period exceeding eight months together*, to wit, *on the 10th day of October 1810, and for the space of nine months then next following*, and did during all that period make his residence and abiding at some other place or places than and except at some other dignity, prebend, benefice, donative, perpetual curacy, or parochial chapelry, of which he was possessed, contrary to the form of the statute; and that the rectory,

\* See 3 *Taunt.* 2.

during

during the time he so absented himself therefrom, was of a large annual value, to wit, of the annual value of 1200*l.*, after deducting therefrom all outgoings, except any stipend paid to any curate; and by reason of the premises and by force of the statute, an action hath accrued to *Hardy* to demand and have of and from *Cathcart* a large sum of money, to wit, 800*l.*, being two thirds of such annual value. Tenth count, that *Cathcart* after the passing of the 43 G. 3., to wit, on the 19th of *August* 1811, and for two years then last past, was and still is a spiritual person, and prebendary of the prebend of *Langtoft*, founded in the cathedral and metropolitical church of *St. Peter* in *York*, and for and during all that time possessed of the prebend, and that he so being such spiritual person, &c. and not regarding the statute, did, after the passing of the said statute, without sufficient cause, as in or under any act or acts of parliament recited or mentioned in the said statute is specified, or such other sufficient causes as would exempt him from any of the pains, penalties, and forfeitures, under the recited acts, for any non-residence, and without having any such licence or exemption as in the said statute mentioned for that purpose, wilfully absent himself from his prebend for the whole of the year 1810, and did during all that period make his residence and abiding at some other place or places than and except at some other dignity, prebend, benefice, donative, perpetual curacy, or parochial chapelry, of which he was possessed, contrary to the form of the statute; and that the prebend, during the time he so absented himself therefrom, was of a large annual value, to wit, of the annual value of 600*l.* after deducting therefrom all outgoings, (except any stipend paid to any curate.)

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 against  
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*against*  
 HARDY.

and by reason of the premises and by force of the statute an action hath accrued to *Hardy* to demand and have of and from *Cathcart* the sum of 450*l.*, being three fourths of such annual value. Plea, nil debet. And upon these counts *Hardy* obtained a verdict at the assizes, viz for 540*l.* on the second, and for 31*l.* 14*s.* 6*d.* on the 10th; whereupon judgment was entered for him in the Common Pleas.

And now *Richardson*, in support of the errors assigned, took the following exceptions: 1st, that it does not appear by the second count that the defendant absented himself from his benefice for more than eight months in any one year, computed either as a calendar year, or as a year from the time of his induction. If the statute meant the latter, then the time of his induction ought to have been shewn, and for this exception, also, the other count will be bad. But supposing it does not mean year from the time of induction, then it must mean calendar year, that is, a year commencing on the 1st of *January*, in conformity with the general rule that where time is not computed in an act of parliament, it shall be computed according to the calendar. Therefore in some acts, as in the assessed-tax act, &c., where a different year from the calendar year is intended, it is so expressed; but here the statute requires that it should be an absence in any one year, leaving it undefined what year, and, therefore, it shall be reckoned a calendar year. And if so, then the second count, which charges an absence exceeding eight months from the tenth of *October* next following, is ill, because it negatives the possibility of its being in any one calendar year. And in the precedents, in *Lill. Entr.* 151., and

*Rast.* 599., it will be found that the declaration does shew the absence to have been within one calendar year. 2dly, It does not appear by the second count that the rectory of *Methley* is such a benefice as falls within the statute. It is not every rectory that is a benefice within the meaning of the statute; the statute expressly provides that no parsonage that hath a vicar endowed, or perpetual curate, and having no cure of souls, shall be taken to be a benefice within the meaning of the act; and, therefore, unless this rectory has the cure of souls it is not within the act, and the declaration ought to have averred it, for the cure of souls is not necessarily annexed to every rectory. It is no answer to say that it was for the other side to shew the contrary as matter of defence, according to the rule laid down by *Treby C.J.* in 1 *Lord Raym.* 120., and adopted by *Lawrence J.* in 7 *T.R.* 31., because that rule only applies where a party claims an exception introduced in his favour, as if this had been a claim to be exempted from residence by reason of having a licence, or as being chaplain to one entitled to have chaplains; but here the objection is, that the party suing has failed to bring the benefice in respect of which he sues within the description in the statute. 3dly, The precise portion of time for which the absence continued, ought to have been shewn in the second count; the charge in substance is, that he absented himself for a period exceeding eight months, and it is laid, under a *videlicet*, to be from the tenth of *October*, and for the space of nine months then next following; so that here are nine months and a day, out of which the party might make good the charge of an absence exceeding eight months, and it is uncertain to what particular portion of that time it relates; neither does

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*against*  
 HARDY.

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 against  
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does the finding of the jury ascertain it ; and unless the precise portion of time be ascertained, it will be impossible for the defendant to plead it in bar to another action. And it seems by analogy to the mode of declaring under stat. 21 H. 8. c. 13., that here the plaintiff was not restrained to the eight months, immediately consecutive to the tenth of *October*, for under that statute, if the plaintiff declared upon an absence of 12 months from the first of *January*, and failed to prove the first month, he might nevertheless recover for the residue. And, therefore, in cases like this, sometimes the verdict ascertained the precise time, as in *Lill. Entr.* 511., in an action upon the statute for penalties, for absenting himself from church, the jury found a verdict for 20*l.*, parcel, &c., *to wit, for the last month of the ten months in which the defendant had absented himself, &c.*, and as to the residue *non debet* ; and by this means, the present objection seems to have been cured. And in *Treswell v. Middleton (a)*, where to counts for wares bought, and for several retainers, and several sums lent, in the whole amounting to 42*l.* 9*s.*, the defendant pleaded *nil debet*, and it was found *quod debet*, 30*l.* *inde, et quoad residuum non debet*, judgment was reversed, because the jury did not find for which of the contracts or retainers the defendant owed, so that he could not know for which he was condemned, and for which acquitted, or plead it in bar to other actions. 4thly, As it is clear the second count includes portions of two calendar years, supposing that to be no objection, still it should have been shewn, whether the penalty is demanded in respect of the annual value of the one year or the other. The penalty is a proportion of the

(a) *Cra. J.* 653.

annual

annual value according to the length of absence, that is, the actual annual value of one year, and not an average value of two. The last objection, which went to the 10th count only, viz. that a prebend, was not within the statute, it was agreed could not be supported.

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against  
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*Scarlett* was to have argued contra, but the Court, without hearing him, decided against all these exceptions as the argument went on; upon the first, Lord *Ellenborough* C. J. said, that he had no doubt that "any one year" in the statute was not to be construed one calendar year commencing from the first of *January*, nor one year from the day of the defendant's induction, but one year before the commencement of the plaintiff's suit. And he observed, that this was a construction to which it did not appear that the attention of the Common Pleas had been drawn; and *Dampier* J. said, the latter was the most reasonable construction; and in the precedent cited from *Lill. Entr.* 151., it is alleged that the defendant absented himself for seven months in a year computed from the fourth of *April*, and not in a calendar year from the first of *January*; and the policy of the act seemed to be to prevent spiritual persons from absenting themselves from their benefices for more than three months within the period of a year. Upon the second point Lord *Ellenborough* C. J. said, that the rule was inveterate if there be a substantive proviso creating an exception it is for the party who would bring himself within it to plead it; and *Le Blanc* J. added, that benefice was the general term mentioned in the act, but the act contained a proviso, excepting certain benefices out of the comprehension

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against  
HARDY.

prehension of that general term; and *Dampier J.* said that he was not aware that it had been the practice in declaring upon the stat. of *H. 8.* to aver the cure of souls. Upon the other exceptions, Lord *Ellenborough C. J.* said, that it struck him that the time must be computed as a period exceeding eight months in a consecutive series from the 10th of *October*, for it was defined and made certain by the words "then next following," which were material; and the jury must be presumed to have found that those were the eight months of absence, for which they have given their verdict; and the annual value must mean as in common parlance average value; otherwise it was observed by *Dampier J.*, a late season and an early one might possibly include two harvests within the year. Upon the 10th count Lord *Ellenborough C. J.* said, the word prebend was certainly in the act, though it might be hard measure to a party who had no house of residence on his prebend; and *Dampier J.* observed, that the truth was when the stat. *H. 8.* passed prebendaries were habitually resident on their prebends, and had houses of residence.

Judgment affirmed.

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DOE, on the demise of Lady WILSON, against  
ABEL.

Tuesday,  
May 17th.

**EJECTMENT** for land at *Hampstead*. At the trial before Lord *Ellenborough* C.J. at the *Middlesex* sittings in *Easter* term 1813, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

By lease (20th *December* 1805) Lady *Wilson* (the lessor of the plaintiff) demised to the defendant for 21 years from *Michaelmas* preceding at the yearly rent of 22*l.* a field of meadow or pasture land in *Hampstead*, then in the occupation of the defendant, and containing two acres, two roods, and fifteen perches, with an exception of all mines, quarries, royalties, metals, gravel, timber, &c., and full and free liberty (among other things) for Lady *Wilson*, or any others authorized by her, to come into the demised premises at all seasonable times in the day-time, there to examine the state thereof, and for any other reasonable occasion, and under the following covenant (among others) on the defendant's part:

“ That if the lessor or person entitled to the freehold or inheritance should be desirous at any time during the term to take all or any part of the land demised for building thereon, and for yards and gardens to such buildings, it should be lawful for the lessor or her assigns, or person entitled as aforesaid, to enter and come

take the whole of the land for building, and at the expiration of that refusal by the tenant to deliver up possession, might bring ejectment.

Lease of land for term of years with a covenant by lessee that if lessor should be desirous during the term to take all or any part of the land for building thereon, &c. it should be lawful for her to come into and enter upon all or any part to make such buildings as she should think proper, and to do all necessary acts without interruption by lessee, provided lessor gave six months' notice of such intention, with a proviso also that the lease should be void for non-performance of covenants: Held that lessor having agreed with a third person to the terms of a building contract, might give six months' notice of her intention to time, and after

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into and upon all or any part or parts of the said land to make such buildings as she or they should think proper; and generally to do all such acts as should be requisite and necessary in any such case, without any interruption by the defendant, his executors, administrators, or assigns: provided always, that the lessor or person entitled as aforesaid should give or leave notice in writing of such intention to the defendant, his executors, &c. six calendar months at the least previous to the time of entering upon the said land, or any part thereof, for the purposes aforesaid or any of them: and provided also, that the lessor should in every such case allow or pay to the defendant, his executors, &c. for each and every acre of the said land so taken, the yearly rent of 8*l.* 8*s.*, and so in proportion for any greater or less quantity than an acre;" and there was also a proviso that if the yearly rent should be unpaid 21 days next after either of the days of payment, or if the defendant should make default in the performance of any of the covenants, the lease should be utterly void, and it should be lawful for the lessor, &c. to re-enter."

The defendant was tenant of the land antecedently to the lease, and afterwards continued in possession under it. In *March* 1808 Lady *Wilson* and her son, who was remainder-man in fee, sold and conveyed one rood and twenty perches of the said meadow to one *Neave*, of which sale the defendant had notice. Lady *Wilson* and her son having agreed between themselves to let certain parts of their estates, if they could, for a long term of years for building purposes, and amongst them the residue of the said meadow, (the subject of this ejectment,) employed a surveyor to let off the same; and some offers were made for taking the same upon a  
 building

building lease, and the terms of a contract for this purpose were agreed upon, but no contract was actually signed. Lady *Wilson* never had any intention of building at her own expence, nor had she any existing buildings to which the land in question was annexable for yards or gardens. On the 23d of *March* 1810 Lady *Wilson* served on the defendant a notice, which, after referring to the provisoes in the lease, and the former sale of a part of the meadow to *Neave*, went on as follows:

“ I do hereby give you notice that it is my intention to take the residue of the said field demised to you by the aforesaid lease, for building thereon, and for other the purposes expressed in the provisoes aforesaid, or one of them; and that it is my intention to enter and come into and upon the residue of the said field of land on or at *Michaelmas* day now next ensuing, (or so soon afterwards as I shall think fit,) for the purposes aforesaid, or some of them, up to which period the rent payable by you by virtue of the aforesaid lease will continue, but will thenceforward cease on my entering into possession, agreeably to this notice.” The defendant regularly paid his rent up to the time of this notice being given, but no subsequent rent for the land has been paid or required.

On *Michaelmas* day 1810, when the above notice expired, or the day following, Lady *Wilson's* steward and attorney attended at *Hampstead*, and went to the gate of the field in question, where he saw the defendant's gardener, and as the agent for and in the name of Lady *Wilson* demanded possession of the land, which the gardener refused to surrender. The steward was not accompanied by any surveyor, builder, workmen, or building materials, nor had either been engaged

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engaged or bespoke. The question for the opinion of the Court is,

Whether under the circumstances above stated, the plaintiff is entitled to recover; if the Court shall think he is, the verdict is to stand; if otherwise, a nonsuit is to be entered.

*Spankie*, for the plaintiff, argued that the true intent of the defendant's covenant was this, that the lessor should be at liberty upon six months' notice to determine the lease as to the whole or any part of the demised land which she should be desirous of taking for building, &c., and that consequently the lease determined at the expiration of the notice, or had become void by the tenant's refusal to deliver possession according to the covenant. The covenant provides, that if the lessor should be desirous to take all or any part for building, &c., she should give six months' notice; it does not require that such desire should be evidenced by any previous acts on the lessor's part, though if that were necessary, here it is stated that she had entered into a building contract. And in *Russel v. Coggins (a)*, where the lease contained a proviso, that if the premises should be wanted for building, the tenant should deliver up possession, and it appeared that the lessor had given notice to the tenant that he wished to have the land for building, and that it was not colourable, for he had entered into a treaty, the master of the rolls said, "that there was no defence at law." And surely the words "if the lessor should be desirous to take the land for building" are fully as comprehensive as "if the premises should be wanted for building." The covenant goes on to provide that

(a) 8 Ves. Jun. 34.

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the lessor may enter on all or any part, which could only be by the quitting of the tenant. The entry of the one necessarily imports the secession of the other, without any express stipulation to that effect, and that appears manifestly by the subsequent proviso for abatement of the rent in proportion to the quantity of land resumed by the lessor. Therefore the lessor having given due notice according to the covenant, the lease determined at the expiration of that notice, and the land reverted to her, and she may maintain ejectment against the tenant who holds over. And, besides, the defendant having made default in the performance of his covenant by refusal to deliver up the possession at the demand of the lessor's steward, the lease has become utterly void, and the lessor is entitled to her ejectment without any previous formal re-entry, which is only necessary to avoid a fine.

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*Marryat*, contra, contended that this was not a covenant to permit the lessor to resume the land into her own hands, but merely to permit her to enter for a qualified purpose, such as building, &c., and to do the acts necessary for that purpose, without interruption by the tenant. There is not any covenant that the tenant shall surrender, or that the lease shall determine on notice, and, therefore, the tenant's refusal to yield up possession is not a breach of his covenant, nor can the lease be avoided, unless it be shewn that the tenant has interrupted the lessor in coming on the premises to build, &c., which is not the case here, because the lessor did not come on the premises to build, &c., but only to demand possession. The proviso for abatement of the rent also shews that it was not a general

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resumption of the land by the lessor that the parties contemplated, but a taking piece by piece as occasion required, and, therefore, it provides for a proportional abatement of the rent. And if the parties meant that the lease should determine at the expiration of the six months' notice, they would have so expressed it, as they have done in the proviso for non-payment of rent, and non-performance of covenants, so that it is clear they knew how to provide for it when they so intended. And though at the expiration of this notice the lessor might have entered with her workmen to build on such parts as she was desirous of building upon, it appears that she never had any intention of building herself upon or annexing the land to other buildings, nor had any other persons under her such an interest as would have entitled them to claim to enter for the purpose of building, &c., for the building contract was unexecuted.

Lord ELLENBOROUGH C. J. According to the construction maintained for the defendant, the animals, if there were any upon the land, were to recede pedetentim foot by foot according as the buildings should advance. But really one must put something like a sensible construction on the words of this covenant, otherwise it would be necessary to give a fresh six months' notice for every piece of the land as it might come into use in the progress of building. The covenant is clearly and expressly, that if the lessor shall be desirous to take all or any part of the land for building, &c., that is, if the whole or any part should be wanted for the purposes of building, she may enter for such purpose, and for all necessary acts, without interruption by the defendant,

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upon giving six months' notice of her intention. "Should be desirous" certainly means that she should be *bonâ fide* desirous, and she must intimate such her desire by six months' notice. All this has been performed; she has been desirous of taking all; she contemplated a possible and probable expectation of covering the whole with building, and the covenant that she shall not be interrupted extends to the taking of all, and not merely to the building, but to the doing all necessary acts. The plan of building, probably, could not be proceeded with unless the whole was put into her possession, and laid open to the introduction of materials for building, which is the first step. The lessor therefore gives due notice that she is desirous of taking the whole; and at the expiration of the notice her steward attempts to make an entry, by demanding possession, but instead of finding the premises open to him, he finds a person there resisting. He demands possession, that is, that the lessor might enter for the purpose of building, and the person refuses to surrender, which imports, not that he refused to execute a surrender, but to surrender according to the demand. Therefore it seems to me, that *quâcunque viâ datâ*, whether the lessor stands upon the covenant that she should be at liberty to determine the lease upon notice, or upon the covenant for re-entry for breach of covenants, she is entitled to the possession of this land.

Le BLANC J. The question depends upon the construction of this covenant and proviso, which the court must construe according to the intention of the parties to it. If the Court see that the construction contended for by the defendant cannot by possibility

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carry into effect the intention of the parties, they will not put that construction upon it. The lease is a lease of about two acres and a half of meadow-land, and there is a covenant by the defendant, that if the lessor should be desirous at any time during the term to take all or any part of the land for building, and for yards and gardens to those buildings, it should be lawful for her or her assigns to enter and come upon all or any part of the land to make such buildings as she should think proper, and to do all necessary acts without any interruption by the defendant, provided she gave notice in writing of her intention six months before entering, and provided she made abatement of the rent at the rate of eight guineas for an acre. The construction put upon this by the plaintiff's counsel is, that if there were a bonâ fide intention on her part to appropriate the whole or part of the land to building, and due notice were given, she might re-enter into the whole or into part. The construction of the defendant's counsel is this, that she was not at liberty to enter on any part with the intention of building on it, except when the workmen actually came to the spot, and then they were to take it piece by piece as they went along in the progress of the building. If this were the construction, how could the proviso with respect to the abatement of rent be carried into effect; must the rent abate according to every foot or square yard as it is progressively taken? The stipulation that there should be six months' previous notice, shews that the parties must have intended that if the lessor should agree for making a building contract, she should have it in her power to give notice, (for it would have been madness in her, as well as in the other party, to enter into an absolute contract before pos-  
session

session was obtained,) and therefore the meaning was that the lessor might give notice of her intention, and might resume all or any part of the land for the purposes of building, without waiting until such time as she was ready to enter with materials and workmen. In short, I consider this not merely as a covenant, that the lessor might come upon the land in order to build upon it, but that she might take it back for the purpose of building.

BAYLEY J. was of the same opinion, but said, he could add nothing.

DAMPIER J. also concurred, and said, that he had looked the case over and over without being able to discover any argument on which an objection could be founded.

Judgment for the Plaintiff.

### WILSON and Another *against* KEMP.

*Tuesday,  
May 17th.*

THE plaintiffs declared in assumpsit against the defendant, as acceptor of a bill of exchange, and on the money counts. The defendant pleaded the general plea of bankruptcy concluding to the country. Replication, that the plaintiffs ought not to be precluded from having their action, because, admitting that the defendant became a bankrupt, and that the causes of action accrued before his bankruptcy, the replication alleges that after the 24th of *June* 1732, and after the stat. 5 Geo. 2.

After a general plea of bankruptcy concluding to the country, a replication that defendant was before the commission discharged as a bankrupt, and that his estate has not produced 15s. in the pound, which was pleaded in

maintenance of the action generally, and with a verification, was held ill on special demurrer.



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 against  
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a. 30., and before the issuing of the commission against the defendant, under which he was declared a bankrupt, to wit, on the 19th of *October* 1807, the defendant was discharged as a bankrupt by virtue of that act, and that afterwards, to wit, on the 23d *August* 1811, he was again discharged, &c., and that his estate has not produced 15s. in the pound, and the replication concludes with a verification and prayer of judgment and damages, &c. Demurrer, assigning for causes, that the plaintiffs have not in their replication accepted the issue tendered by the plea, although the same is a material and sufficient issue, but have proceeded to reply specially matters which might have been given in evidence under that issue; and also, for that by the replication they have attempted to deprive the defendant of the benefit of pleading his bankruptcy generally according to the form of the statute, &c., and to oblige him to come to a more special and particular issue upon matters which he is entitled to give in evidence under that general plea; and also for that the replication is pleaded, and concludes in maintenance of this action generally, whereas if the matters alleged be true the plaintiffs are not upon the pleadings herein entitled to judgment against the defendant except in respect of his estate and effects, according to the form of the statute, &c. Joinder.

And *the Court*, without hearing any argument in support of the demurrer, were of opinion, that upon both causes assigned the replication was ill, 1st, because it prayed judgment generally, instead of being confined to the future estate and effects of the bankrupt; 2dly, because a replication concluding with a verification could not be pleaded in reply to a plea concluding

concluding to the country. And in answer to *Campbell*, who said, that in *Thornton v. Dallas* (a) precisely the same replication was pleaded, *Dampier J.* observed, that it had been otherwise decided many times, although in *Thornton v. Dallas* no objection was made upon that ground. Whereupon *Campbell* prayed leave to amend, which the Court granted.

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*F. Pollock* was in support of the demurrer.

(a) *Dougl.* 46.

### PAGE *against* BUSSELL.

*Tuesday,*  
*May 17.*

**D**ECLARATION in assumpit for money lent, paid, had and received, and upon an account stated. Plea, actio non, because the defendant was a prisoner at the suit of one *Stokes* on the 1st of *May* 1811, mentioned in stat. 51 G. 3. c. 125. "for the relief of insolvent debtors," and that afterwards, on the 23d of *August* 1811, he was discharged before the justices at sessions, according to the provisions of the said act, and that the sums of money in the declaration mentioned were paid by the plaintiff as the surety for and in respect of a certain annuity contracted for and granted by the defendant to one *Guest* before the said 1st of *May*, &c. Replication, that after the said 1st of *May*, and after the discharge of the defendant, and before the commencement of this suit, to wit, on 1st of *May* 1813, the plaintiff was called upon, and forced, and obliged to, and did pay the said sums of money in the declaration mentioned, as the surety for the defendant, and in respect of the said annuity.

A person discharged under 51 G. 3. c. 125. (insolvent act,) is liable to his surety for the arrears of an annuity due since his discharge, which the surety has been obliged to pay.

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Demurrer. Joinder.

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against  
BUSELL.

*Curwood*, in support of the demurrer, contended, that the defendant's discharge under the 51 G. 3. c. 125. was a discharge against all demands in respect of the annuity, and any payments thereof made by the surety, notwithstanding those payments were made after the defendant's discharge. And he referred to s. 16. which enables the creditor of any debtor, who shall be discharged, for any sums payable by way of annuity at any future times, to be admitted a creditor, and receive a dividend of the estate, in the same manner as if the debtor had become bankrupt. And by 49 G. 3. c. 121. s. 17., an annuity creditor of a bankrupt may prove the same under the commission, whether there are or are not any arrears at or before the time of bankruptcy, and the certificate of every bankrupt under whose commission such proof is or might have been made, shall be a discharge of such bankrupt against all demands whatever in respect of such annuity, and the arrears and future payments thereof. Therefore as the debtor under the 51 G. 3. c. 125. is placed in *pari loco* with the bankrupt under the 49 G. 3. c. 121., it follows, that he, as well as the bankrupt, shall be discharged of all demands whatever in respect of the annuity, and the surety can no more resort to him for repayment of the arrears than he could have done if he had been bankrupt; and however hard this may appear it is *casus omissus* out of the statute.

LE BLANC J. The 51 G. 3. says, that the creditor shall be entitled to be admitted a creditor, but it does

not say, that the debtor shall be discharged, in the same manner as if he had been a bankrupt.

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against  
RUSSELL.

BAYLEY J. Even in the case of a bankrupt, if the annuity creditor does not come in and prove, but disregarding the bankruptcy sues the surety, the surety cannot insist on the certificate, and if he cannot, may not the surety afterwards resort to the bankrupt? The present is a debt accrued since the debtor's discharge, and therefore the plaintiff is entitled to judgment.

*Per Curiam,*

Judgment for the plaintiff. (a)

*Comyn, contra.*

(a) *Semb.* also that the plea was ill, being pleaded in bar of the action. See 51 G. 3. c. 125. ss. 32. 60. and 2 Lord Ray, 1383. *Mane v. Harvey*. See also for a form of plea, *Willet, R. 199. Ladbroke v. James*.

THYNNE, Administrator, &c. of ANDREW  
THYNNE, *against* PROTHEROE.

*Tuesday,  
May 17th.*

**A**SSUMPSIT upon a special agreement made with the plaintiff's intestate, whereby for a consideration therein stated the defendant agreed to pay the intestate 2100*l.* by the 1st of *January* 1813. The declaration contained also the usual money counts; in all of which the promises were laid to the intestate; and the plaintiff made profert of the letters of administration.—  
Plea, non assumpsit.

Assumpsit by administrator upon promises laid to the intestate, with a profert of the letters of administration, and non assumpsit pleaded, the defendant cannot, upon the production of the letters of admini-

nistration object that they are not properly stamped, for the plea admits that plaintiff is administrator.

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THYNNE  
against  
PROFFEROR.

At the trial before Lord *Ellenborough* C. J., at the *Middlesex* sittings after last *Hilary* term, the plaintiff, in consequence of notice given him by the defendant, produced the letters of administration, by which it appeared that the sum sworn to, and for which the letters of administration were granted, was under 100*l.*, and the stamp was for a value not exceeding that sum. It was objected, that the letters of administration were on a stamp of too low a denomination, the demand in the present action being to a much greater amount, and the case of *Hunt v. Stevens* (a) was cited, and thereupon the plaintiff was nonsuited.

A rule nisi was obtained in this term for a new trial on the ground that the objection was not open to the defendant upon *non assumpsit*, but only upon a plea disclosing the special matter, or upon a plea of *ne unques* administrator. And *Hunt v. Stevens* was distinguished, because here the promises are laid to the intestate, there the administrator declared upon a conversion *in his own time*, and therefore, in such case, according to *Lawrence J.*, the styling himself administrator is of no avail, he must prove himself to be such, and the question is raised by the plea of not guilty in trover, it goes to the foundation of the plaintiff's title, and the want of administration need not therefore be specially pleaded. And conformably with this distinction which he recognized, *Holt C. J.* in *Marsfield v. Marsh* (b), upon trover by the administrator, where the property was laid *in the intestate*, refused to admit evidence on not guilty, to shew that the plaintiff was not administrator, saying that the defendant should have pleaded it. And so in *Gidley v.*

(a) 3 *Taunt.* 113.(b) 2 *Lord Ray.* 814

*Williams (d)*, it was resolved that the plea of non est factum admits the plaintiff to be a good administrator; and the same doctrine is laid down *Com. Dig. Pleader*, 2 D. 10. 2 D. 14.

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THYNNE  
against  
PROTHEROE.

*The Attorney-General, Park, and W. Owen*, shewed cause, and contended that the defendant could not have pleaded ne unques administrator, inasmuch as the plaintiff was rightful administrator, and had obtained administration from a court having competent jurisdiction; and the want of a proper stamp does not make the letters of administration void, but only that they shall not be given in evidence, which was first enacted by stat. 9 & 10 W. 3. c. 25., and has been continued in the subsequent statutes (b). Wherefore the plaintiff has failed in proving his title.

But *the Court* said, that in this case upon the general issue the plaintiff had no occasion to produce the letters of administration at all, for the plea admitted that he was administrator, and therefore the defendant had no right to insist upon their production. And if this could be done it would be a means of getting the benefit of ne unques administrator upon the general issue.

Rule absolute.

*Marryat and Reader* in support of the rule.

(a) 1 Salk 38. 3 resolution.

(b) See 48 G. 3. c. 149. s. 2.

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Wednesday,  
May 18th.

MILLS, Assignee of E. CHAMBERS, H. C. GRANGER, and R. CHAMBERS, jun. (Bankrupts,) against BENNETT.

Where one of three partners in a banking concern who resided at the place where the banking house was, and was the only partner who transacted the business, the other two residing at a distance from it, absented himself from the banking house, shut it up and stopped payment: Held that this was not evidence of a joint act of bankruptcy by all three.

The defendant, though he has given no notice that he intends to dispute the proceedings under the commission, may nevertheless give evidence to disprove the act of bankruptcy.

THE plaintiff sued as assignee under a joint commission against the three.

At the trial before *Bayley J.* at the last assizes for the county of *Devon*, no notice having been given that the defendant intended to dispute the proceedings under the commission, the deposition made before the commissioners was put in and read, which stated that the three bankrupts carried on a banking concern, under the firm of *Chambers, Granger, and Chambers, at Collumpton*; that on or about the 29th of *May 1812*, they absented themselves from the banking house in *Collumpton*, shut up the same, and stopped payment, for the purpose of avoiding and delaying their creditors. It was proved, however, that *E. Chambers* was the only partner, who resided at *Collumpton*, and transacted the business there; the other two residing one in *London*, and the other at a considerable distance from *Collumpton*. The learned Judge doubted, upon this evidence, whether it amounted to proof of an act of bankruptcy by all the three; but he permitted the plaintiff to take a verdict, with liberty to the defendant to move for a nonsuit. Accordingly a rule *nisi* was obtained in this term for that purpose.

*Gifford* (with *Lens Serjt.*) now shewed cause; and submitted that it was not competent to the defendant, who had given no notice under the stat. 49 G.3. c. 121.

S. 10.,

s. 10., that he intended to dispute the proceedings, to adduce evidence in order to controvert the act of bankruptcy, inasmuch as where no notice is given, the proceedings must be taken as conclusive against the party of the act of bankruptcy therein alleged. But, 2dly, supposing the defendant might adduce evidence in disproof of the act of bankruptcy, the evidence here did not disprove its being a joint act of bankruptcy by all the three partners. To constitute an act of bankruptcy, the stat. 1 Jac. I. c. 15. does not require that the party should absent himself from his dwelling house, it says, "otherwise absent himself;" and, therefore, if partners, having a known place of trade for carrying on their joint concerns, shut it up for the purpose of delaying their creditors, it is within the meaning of this clause, though they do not depart from their dwellings; *Judine v. Da Cassen*. (a)

*Gaselee*, contra, denied that the shutting up the counting house by one of several partners was an act of bankruptcy by all.

The Court agreed, that here was not sufficient evidence of a joint act of bankruptcy by all the three partners; and *Bayley J.* observed, that one of the witnesses had stated that *R. Chambers* (one of the three) had no concern with the bank; and also that in *Judine v. Da Cossen* the bankrupt was a sole trader, and when he departed from his counting house, took his books with him without any intention of returning. Upon the other point Lord *Ellenborough C. J.* said, it had

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(a) 1 N. R. 234.



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MILLS  
against  
BENNETT.

been decided that the proceedings were not conclusive (a); and *Bayley J.* observed, that the 49 G. 3. c. 121. s. 10. only enacts that the proceedings under the commission shall be evidence to be received of the trading and bankruptcy, but like all other evidence it is liable to be controverted by evidence; and *Dampier J.* added, that at first he had been inclined to think that the act meant to make the proceedings conclusive, because the assignees having received no notice might come unprepared to meet the evidence, but on looking into the act he found it was otherwise.

Rule absolute.

(a) See *Ellis v. Shirley*, 3 Campb. N. P. C. 424.

Wednesday,  
May 18th.

### The KING against The Inhabitants of HASLING- FIELD.

Upon an indictment against the parish of *H.* for not repairing a highway, an award made by commissioners under an inclosure act, which awarded the highway to be in a different parish, was holden not to be admissible evidence for the defendants without shewing that the commissioners had given the previous notices required by the act before they ascertained the boundaries; it appearing that the usage had not been pursuant to the award, the defendants having since the award, as well as before, repaired the highway.

THE defendants were presented for not repairing a public highway, situate in the parish of *Haslingfield*. It was admitted by the defendants that it was a public highway, and out of repair, and the only question was, whether it was locally within the parish of *Haslingfield*.

It was proved by the vicar of *Harston* parish, who presented the highway in question, which was called *Mill-lane*, that it began at a small distance from *Harston Mills*, and was continued to the village of *Haslingfield*; and it was also proved by several witnesses that the parish of *Haslingfield* had always repaired the road both before and since the *Harston* inclosure, which was about 16 or 17 years ago, and that in 1807 the

parish

parish had repaired it throughout with bushes and faggots, and that it had always been reputed to be in the parish of *Haslingfield*; and the inhabitants of the parish had exercised common right by depasturing the land from *Lammas* to *Lady-day*, and in one instance a poney belonging to an inhabitant of *Harston* parish had been impounded for trespassing on the road.

The defence was, that the parochial situation of this road had been altered by an award of the commissioners under the *Harston* inclosure act (a), pursuant to an authority given to them for that purpose, by which award the road in question was awarded to be locally situate in the parish of *Harston*. The inclosure act does not particularly mention the parish of *Haslingfield* but authorizes the commissioners to ascertain the parochial locality of roads, belonging to the adjacent and contiguous parishes, under which description the parish of *Haslingfield* falls, after having given certain previous notices to the parishes to be affected by the award. This award was tendered in evidence, but the learned judge refused to admit it unless it could be shewn, that the notices required by the act had been given, and thereupon a verdict was found by his direction for the crown.

In this term a rule nisi was obtained for a new trial upon the rejection of this evidence, and the learned Judge reported, that he should have had no difficulty in admitting the award, if the usage had been pursuant to it, presuming that the proper notices had been given. But in this case the award seemed to be equally unknown, until this prosecution, to the parish of *Haslingfield* and

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The King  
against  
The Inhabitants of  
*HASLINGFIELD*.

(a) 38 G. 3.

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The King  
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ants of  
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FIELD.

the parish of *Harston*, whose vicar presented the road. The learned Judge therefore was of opinion, that the contrary usage rebutted the presumption, and called on the defendants' counsel to prove the preliminary notices.

*Best*, who shewed cause, relied on the distinction taken by the learned Judge.

*Robinson*, contra, contended that the clause respecting the notices was merely directory, the neglect of which would not vitiate the award of the commissioners; but supposing that to be otherwise, then it must be taken that the commissioners have given the proper notices, because where authority is given to persons by act of parliament to do certain public acts, and they do them, it shall be intended that they have performed all that was required to give effect to those acts, unless the contrary be shewn. Therefore under the marriage act (*a*), which requires that there should be a previous publication of banns by a clergyman, if the banns be published, it has always been intended that the clergyman who published them was lawfully ordained, unless the contrary be proved. So here the commissioners were to ascertain the boundaries, after giving certain notice to the parishes to be affected by it, and to make their award, and they have made it, therefore it shall be intended *prima facie* that they gave such notice; and that the rather, because by the act of parliament an appeal is given to the sessions within a limited period, so that if there was any omission, advantage might have been taken of it while the thing

(a) 26 G. 2. c. 33.

was recent. And the clause which directs that the award shall be inrolled and admitted in all courts as legal evidence, would be nugatory if it were merely evidence of the fact that such an award was made.

LORD ELLENBOROUGH C. J. The general rule certainly is that where a person is required to do an act, the not doing of which would make him guilty of a criminal neglect of duty, it shall be intended that he has duly performed it unless the contrary be shewn. Such was the principle which governed the decision in *Williams v. East India Company (a)*. But in this case there is negative evidence, viz. that the parish of *Haslingfield* have continued to repair, which does away the presumption that all has been duly performed, because if that were so they ought not to have continued to repair.

LE BLANC J. The commissioners had only authority to ascertain the boundaries of the parish, so far as they related to the lands intended to be allotted.

BAYLEY J. The clause gives the commissioners power to set out the boundaries giving notice to the other parishes interested besides *Harston*. The circumstance of *Haslingfield* having continued to repair after the award, raises a presumption that there had not been such notice as the act of parliament required.

DAMPIER J. *Haslingfield* have acted ever since the award as if no notice had been given which calls on them to shew it has.

*Per Curiam,*

Rule discharged.

(a) 3 East, 192.

1814.

The KING  
against  
The Inhabi-  
tants of  
HASLING-  
FIELD

1814.  

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Friday,  
May 20th.The KING *against* The Sheriff of MIDDLESEX  
in a Cause of *Henderson v. Van Wrede*.

An attachment against the sheriff for not bringing in the body after the defendant has surrendered is irregular, though the surrender be not made until after the rule for bringing in the body has expired.

THE rule to bring in the body expired on *Saturday* the 7th of *May*; on *Monday* the 9th the defendant surrendered and gave notice, and an attachment was moved for on the next day for not bringing in the body. And because the attachment was moved for after the surrender of the defendant, *Barrow* obtained a rule to set it aside for irregularity.

*Pooley* shewed cause, and cited *Rex v. Sheriff of Middlesex (a)*, that if the sheriff be once in contempt it is not purged by the subsequent render of the party.

But Lord *Ellenborough* C. J. after conferring with the master, said that the master thought it irregular; and *Bayley* J. dissented from the case cited (*b*), and asked whether if the defendant had perfected bail, (and the render was equivalent to it) the plaintiff could afterwards have proceeded with his attachment. But he said the rule for bringing in the body having expired when the attachment was obtained, it might make a difference as to the costs.

Rule absolute without costs.

(a) 8 T. R. 29.

(b) See also *Rex. v. Sheriff of Middlesex*, 7 T. R. 527.

1814.

MOLLING and others, Assignees of WHITE and Others, (Bankrupts,) *against* BUCKHOLTZ.

Friday,  
May 20th.

THE defendant was arrested and holden to bail in trover under a judge's order founded upon an affidavit to this effect: "that one *Schroeder* as agent of the bankrupts (before their bankruptcy) purchased goods for them which were transmitted to the defendant to be by him shipped to the bankrupts at *London*, that the defendant possessed himself of the said goods, and has refused to deliver them to the bankrupts before the bankruptcy, or to the assignees since, and has converted them to his own use as appears by the books of account of *White and others*, and by the letters of *Schroeder* and letters of the plaintiffs, as this deponent believes."

An affidavit to hold to bail under a judge's order in trover by the assignees of a bankrupt, which stated "that the defendant possessed himself of the goods, and has refused to deliver them and has converted them to his own use, as appears by the books of account of the bankrupts, and by the letters of S. (the agent) and letters of plaintiffs as the deponent believes," was holden not to be sufficiently certain to shew a conversion; and therefore the Court discharged defendant on common bail.

*Marryat* obtained a rule nisi to discharge the defendant on filing common bail for the insufficiency of this affidavit, his objection to it being that it contained no positive allegation of any conversion by the defendant, but only as it was matter of inference drawn by the deponent from the books of the bankrupts, and the letters of the agent and the plaintiff.

A supplemental affidavit cannot be used to cure a defect in the affidavit to hold to bail.

*Abbott*, who shewed cause, contended, that the affidavit in substance was this, that to the deponent's belief the defendant had converted the goods; which was sufficiently positive, though he admitted from the omission of the word *and* before *as he believes* there was some ambiguity whether the latter words were not referable

1814.

MOLLING  
against  
BUCKHOLTZ.

only to a belief of what appeared by the books and letters, which he agreed would be insufficient. And he offered a supplemental affidavit.

LORD ELLENBOROUGH C. J. Perhaps the refusal of the defendant to deliver the goods would have been sufficient if it were not for that which follows. The holding to bail under a judge's order was considered in *Omealy v. Newell* (a), as an authority exercised by the Court of very ancient date, and none of the statutes that have been passed have prohibited the Court from the exercise of that authority proprio vigore, but have left the practice of arresting under an order of the Court as it stood before. The Court, therefore, when so extensive a power has been left, will look with extreme nicety to the terms of the affidavit, and if we find it defective in any one particular, as if the matter of it be vouched by reference only to documents, and not by the voucher and belief of the party, we shall not be inclined to act upon it. And as to the supplemental affidavit, the practice does not warrant that, but the party may again apply to a judge for an order to hold to bail. I am afraid this rule must be absolute.

LE BLANC J. It is necessary to have the substantive belief of the party who deposes.

*Per Curiam,*

Rule absolute.

(a) 8 East, 364.

1814.  

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RAMSBOTTOM and Others *against* BUCKHURST.Friday,  
May 20th.

**A**CTION for use and occupation by the plaintiffs claiming by elegit, upon a judgment obtained by them against one *Hawkins*, under whom the defendant was tenant (a). At the trial before *Thomson C. B.* at the last assizes for *Kent*, the plaintiffs proved an examined copy of the record in the action against *Hawkins*, containing the judgment, the award of elegit, and return of the inquisition. It was objected that the plaintiffs should have proved a copy of the writ of elegit, and also of the inquisition. But the learned judge over-ruled the objection, and directed the jury to find a verdict for the plaintiffs, giving the defendant liberty to move for a nonsuit.

In an action by plaintiff claiming under an elegit for use and occupation, an examined copy of the judgment roll, containing the award of elegit and return of the inquisition, is evidence of plaintiff's title, without proving a copy of the elegit and of the inquisition.

Accordingly, *Onslow* Serjt. obtained a rule nisi for that purpose, and referred to *Gilb. Ev. 9.*, that "in ejectment upon an elegit you must prove not only the judgment, and by the judgment roll that the elegit issued and was returned, but also the writ of elegit by a true copy thereof, and the inquisition thereon," and the passage goes on to assign the reason. The same doctrine is also laid down *Bull. N. P. 104.*, 2 *Saund. Williams's Ed. 69. c.* in not. and *Trials per Pais 386. 5 ed.*

*Best* Serjt. and *Marryat* shewed cause, and observed that the passage cited from *Gilbert* was not founded

(a) This action was in case, there were three other actions in debt against three other tenants, in which the same point arose.



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RAMSBOTTOM  
against  
BUCKHURST.

upon any decided case, and there is a quære at the end, "because *Holt* was then of a different opinion, and was for allowing the entry of the roll to be good evidence that the elegit had issued." And the reason on which *Holt's* opinion was formed, viz. "that notice on the roll of the being and return of the elegit is as good evidence that such elegit was, as a copy thereof," is more correct than the other, viz. "that the judgment roll is no more than a memorandum, that it was issued and returned, and so the copy thereof is no evidence, being but a copy of that which is but a copy or memorandum of the thing itself;" for surely the entry on the judgment roll is something more than a copy, being the act of the court, and sanctioned by its authority. And, therefore, unless it can be shewn that the defendant could insist upon the production of the writ itself, all that he can require is a copy of it; and certainly a copy of that which has the sanction, and is the act of the Court, is entitled to as much respect as a copy of the writ itself. In like manner upon an indictment for perjury, the *postea* is evidence that a trial has been had, but if the record has proceeded to final judgment, it is the practice to prove a copy of the plea roll which contains the *postea*, that being an acknowledged entry of the *postea* by the act of the Court, and therefore equivalent to an original.

*Onslow* Serjt. and *Knowlys*, contra, answered that *Holt's* opinion as it is given in *Gilb. Ev.* seemed not to be part of the original text, but rather as subjoined by the editor, and it is not noticed in books of practice, which

which say that the party must not only prove the judgment, and that an *elegit* issued and was returned, but also a copy of the writ of *elegit* and the inquisition (a). And the *elegit* and inquisition are the very foundation of the plaintiff's title, which carve out the term and give the right of entry.

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LORD ELLENBOROUGH C. J. The judgment roll imports incontrovertible verity as to all the proceedings which it sets forth; and so much so, that a party cannot be admitted to plead that the things which it professes to state are not true. Would it be competent to aver that there was no such declaration or plea, or trial, or that the Court did not pronounce such judgment as stated in the record? I apprehend it would not; and therefore every part of the record as long as it remains on the files of the Court must be taken to speak absolute verity.

LE BLANC J. The authorities only go to this, that the *elegit* and inquisition must be proved, but (with the exception of *Gillb. Evid.* and the note in *Williams's Saunders*, which says that he must *produce* a copy of the *elegit* and inquisition) they do not state in what manner they must be proved.

BAYLEY J. The act of the ecclesiastical court directing letters of administration to be granted, is evidence of the title of the party to whom administration is granted without producing the letters themselves (b). Here

(a) See 2 *Tidd's Pract.* 1013. 5. ed. *Rus. Ejt.* 330.

(b) See *Elden v. Keddel*, 8 *East*, 187. See also *Davis v. Williams*, 13 *East*, 232. *Roy v. Clark*, *ib.* 238. n.

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also is the act of the Court awarding the elegit, and the Court will give evidence to its own entry that the return was made.

DAMPIER J. The passage from *Bull N. P.* says, that it is necessary for tenant by elegit to prove the judgment, the elegit taken out, and the inquisition and return thereupon, and so the plaintiffs, as it seems to me, have done here. It is precisely the evidence pointed out in *Bull. N. P.*, and a copy of the elegit and inquisition would not have been such good evidence. Mr. Serjt. *Williams* in his note uses the word *produce*, by which he means *prove*, for he refers to this passage in *Bull. N. P.*

Rule discharged.

Friday,  
May 20th,

BRIDGER *qui tam*, &c. against RICHARDSON.

The stat.  
3 J. 1. c. 12.  
which prohibits  
persons from  
"willingly  
taking, destroy-  
ing, or spoiling  
any spawn, fry,  
or brood of  
any sea-fish in  
any wear or  
other engine or  
device what-  
soever," seems  
not to compre-  
hend shell-fish,  
and if it does,  
it means a  
taking for de-  
struction, and  
not a taking of  
oyster spawn  
for the purpose of removing it to beds, for further growth and maturity to make it  
marketable.

DEBT to recover a penalty of 10*l.*, upon the stat.  
3 J. 1. c. 12., for willingly, with a certain engine  
called a dredge, on the 13th of *September* 1813, taking  
in *Chicester* harbour three gallons of oyster fry and spat ;  
the same being sea-fish, and then of a size unfit for  
food ; 2d count, for a similar penalty, for willingly, with  
a certain other engine called a drag, taking 100  
bushels of spawn, and 100 bushels of brood of sea-  
fish, to wit, of oysters, the same being sea-fish.

At the trial before *Richards B.* at the last assizes for  
*Sussex*, it was proved that the defendant who was a

*Colchester*

*Colchester* fisherman, on the day stated in the declaration, was seen dredging for oysters in *Chichester* harbour; he had dredged about three gallons of brood oysters, besides old oysters. The brood oysters were young spawn, fit to be laid down on beds to grow till they come to be oysters. In using the dredge, the fishermen must necessarily catch the large and small oysters together, but the *Sussex* fishermen use to throw the small overboard. The small fish will thrive if laid down on proper ground, but you destroy the fish if you take the brood away, but do not destroy them by dredging. The defendant's dredge was like others, except that the meshes were something smaller; and he took the brood in question for the purpose of carrying them to *Colchester*, to be laid down there on private lands for further growth and maturity, and to make them marketable. The counsel for the defendant objected, 1st, that the taking must be with intent to destroy, the contrary of which was proved; 2dly, that the act of parliament applied only to floating fish; upon which a verdict was taken for the plaintiff for one penalty of 10*l.* on the second count, with liberty to the defendant to move for a nonsuit.

Accordingly, a rule nisi was obtained for that purpose.

*Best* Serjt., *Courthope*, and *Long*, shewed cause, and first they denied that the act was confined to floating fish; for the act speaks of sea-fish generally, and recites that the brood lies in still waters, and that those who use draw-nets, &c. do destroy the brood of all the sorts of fish aforesaid; all which is applicable to this species of fish, and it is a valuable fish, and fit to be preserved,  
and

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 BRIDGER  
 against  
 RICHARDSON.

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against  
RICHARDSON.

and therefore being within the mischief recited in the act, it shall be included within the general words. Against the other objection, they said the enactment on which this action was founded, prohibited the taking or spoiling, as well as the destroying any spawn, or brood of sea-fish, and therefore the taking is of itself a substantive offence, without looking to the intent; and supposing the intent were material, yet here the intent being to remove the spawn to another place, the taking is within the act, though done for the purpose of its growth, because it appears by the preamble that the act intended the brood should have rest in the still waters where it is spawned to receive nourishment and grow to perfection there, and therefore the removal of it from its natural bed with whatever intent is within the act. And supposing it might be removed for the purpose of farther growth, yet as that cannot be done without destroying some portion of it, the removal would on that account alone be within the act.

*Knowlys* contra, denied that the evidence proved that the necessary consequence of removing the spawn was to destroy some of it. And as to the argument, that the taking was an offence of itself, he said the consequence of that would be, that oysters could never be taken at all, for it was proved that the fishermen in taking the large oyster must necessarily take the small with it; and the throwing it back cannot purge the offence if it be complete by the taking. And in construing this statute, which is a penal statute, the Court will give it a reasonable exposition, and in order to do that will look to the consequence that would follow from its being literally understood; as it is said of the

*Bolognian*

*Bolognian* law, which enacted "that whoever drew blood in the streets should be punished with the utmost severity," and which was holden not to extend to the surgeon who did so in performing a necessary operation (a). So here the taking shall not be holden literally any taking, but a taking only that is destructive of or at least pernicious to the fish. Lastly, it is clear, as well from the mischief recited as the prohibitions enacted, that the statute meant floating fish only. The statute recites "that the brood is destroyed by wears, draw-nets, and nets with canvas, or like engines," and then prohibits in the first place "the setting up any new wear, or the willingly taking, destroying, or spoiling any spawn, &c. of sea-fish in any wear or other engine or device." The prominent feature, therefore, both of the recital and enactment is the destruction by wears, which are inapplicable to the taking of fish that have not the power of locomotion, and consequently cannot be intercepted by wears; and the words other engine or device in the enacting part, mean engine or device ejusdem generis. And so the penalty against fishing with nets of a smaller mesh than is there appointed, and the exception in favour of nets used for taking herrings, pilchards, &c. shew that it is floating fish, and not this species of fish which the act contemplates, inasmuch as it mentions and prohibits those means only that are fitted for the taking of floating fish.

Lord ELLENBOROUGH C. J. This case has been argued by the learned counsel with their usual ability, and with a zeal which is natural and proper. But

(a) 1 Bl. Com. 61.

upon

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upon a fair construction of this act of parliament, whether I look to the particular description which it gives of the fish, or to the means which it recites to have been used to destroy it, or to the end which it had in view, namely, the preventing its destruction before it received the benefit of a deposit in still waters to make it grow to perfection, in none of these points of view can I see that what has been done in this case is contrary to the act. When I look to the usage as it is to be found in the records of the court, upon questions which have arisen touching the bye-laws of the *Milton* fisheries, I find the habit of taking and removing spawn is extremely ancient; there are I believe charters in existence for effectuating that species of fishing, and which existed before the statute of *Jac. 1.* What description of fish does the act mean by the brood of sea-fish? Shell-fish is the proper description of this species of fish, a term which is familiar to the legislature. On looking at the acts of parliament, I find the terms floating fish and shell-fish (*a*), and that floating-fish is used in contradistinction to shell-fish (*b*), and sea-fish synonymously with floating fish; therefore it is fair to presume that if shell-fish had been intended to be included in this act as well as sea-fish, the act would have so expressed it, by using the appropriate phrase brood of sea-fish and shell-fish; but I do not find that shell-fish is mentioned. What is the mischief recited in the act? "That the brood of sea-fish is spawned in still waters, where it may have rest to receive nourishment and grow to perfection, and that it is there

(a) Sec 10 & 11 W. 3. c. 24.

(b) Sec 31 G. 3. c. 51. s. 2.

destroyed

destroyed by wears, draw-nets, &c., and that those who use draw-nets, &c. do destroy the brood of all the sorts of fish aforesaid." Now here the brood is not destroyed, though some perhaps may be, in the process which is adopted for taking it with a view to its ulterior preservation. But the object is not to destroy but to preserve, and the process terminates in changing its place of deposit with a view to the more beneficial nourishment and growth of that species of fish to its perfection. Then let us look at the means by which the fish are said to be destroyed, for one would think that the legislature in guarding against its destruction would prohibit those means which would be most likely to destroy. The first thing prohibited is the setting up any wears along the sea-shore or in any haven, harbour or creek, &c.; which are mentioned in the first instance as being the principal means of destruction. But did any person ever hear of oysters being destroyed by wears? And all the apparatus relates to floating fish, and particularly salmon; it is never applied to the taking a species of fish that is stationary; and the words "other engine or device whatsoever" must be some engine of destruction ejusdem generis. Then the statute speaks of draw nets "under three inches mesh or any nets with canvass;" but are oysters ever caught with such draw-nets or nets with canvass? It has been said properly that they are caught with a peculiar net called a dredging net. And is it to be conceived that the legislature should never have pointed at that species of engine which is the only means of taking the thing, if they had intended the protection of oysters. Therefore if we consider the description of fish as given in the statute,

it

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BRIDGER  
against  
RICHARDSON.



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RICHARDSON.

it appears to be sea-fish and not shell-fish, the destruction of which is the mischief complained of; or if we look to the means by which that is said to be effected, we find that they are not the same as used for the taking of this species of fish. And when we recollect that for a great length of time this species of fish has been better prepared for the consumption of the metropolis by this mode of removal and nourishment, I think that looking at all these things, we cannot consider oysters as falling within the comprehension of the statute.

LE BLANC J. I am of the same opinion. I think this action is not maintainable for using the engine described in the second count. The generality of the term "sea-fish" used in the act has distressed the argument and made it difficult to define correctly what species of fish the legislature had in contemplation when they used it. I do not know that we should be correct in laying it down that no sort of shell-fish was intended by the act; perhaps it may be more correct to determine this case on one ground only, viz. that by the preamble and recital therein, that the brood of sea-fish is destroyed by wears, draw nets, &c. it means such engines only by which the fish is usually destroyed, and that the act does not apply to engines, the use of which may be said to be for the preservation rather than the destruction of this species of fish. Although the enacting part has the words *take* as well as *destroy*, yet in a subsequent part which relates to the forfeiture of *any* net which is under a mesh of a particular size, it adds, "whereby the brood of sea-fish may be *destroyed*." I conceive, therefore, the main object of the

act was to prevent the use of such engines as were calculated for the destruction of the fish. Here the object of the engine was not to take to destroy, but to preserve. I think, therefore, that affords a ground for holding this case not to be within the statute; leaving it open to future consideration, if it should be necessary, whether shell-fish may not be within the act if taken to be destroyed.

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BRIDGER  
against  
RICHARDSON.

BAYLEY J. I am of the same opinion. I think the provision of the act is referable principally to floating fish, and should have considered it difficult to decide that it applies to shell-fish. But this taking was not penal, which had for its object, not the destruction, but that which the act had in view, the preservation of the fish. It appears that this was not taken to be consumed before it was grown to perfection, but to be preserved, and receive nourishment, and come to a better state than it would be in if suffered to remain in its natural bed. On this ground, therefore, I think this was not a taking within the act.

DAMPIER J. I concur with the Court. I think the sense of the statute seems to be confined to floating fish, as well by the manner in which it speaks of taking the fish as by that part of the section where it describes the nets or engines, which are limited to such as are fit only for taking floating fish. But a time may hereafter occur in which it may be as well not to be encumbered with deciding that point. And there is no necessity that we should; for this seems to me not to be a taking to destroy so as to come within the act; for otherwise the act, as it has been observed, would put an end to any taking

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taking at all. If the taking be an offence within it, it cannot be cured by the throwing it back again. But I think the taking must be a taking not with a view to the melioration of the fish, which is the taking here, as appears on the evidence, but a taking for the purpose of destruction.

Rule absolute.

Saturday,  
May 21st.

DOE on the Demise of MANSFIELD against  
PEACH.

Where lands were settled to the use of such person or persons, &c., as *R. P.* and *T. P.* should, during their joint lives, by any deed or writing under both their hands and seals, to be by them duly executed in the presence of, and to be attested by two witnesses, limit and appoint, and until such appointment to the use of *R. P.* for life, remainder to the use of *T. P.* for life, and they by deed, signed, sealed, and delivered by them, in the presence

**EJECTMENT.** At the trial before *Wood B.* at the last *Lent* assizes for the county of *Northampton*, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:

By indentures of lease and release (29th and 30th September 1782,) to which *Robert Peach*, *Thomas Peach* (the defendant) described as eldest son and heir at law of the said *R. Peach*, and *John Mansfield* (the lessor of plaintiff), were parties, and a recovery suffered in pursuance thereof, the premises in question were settled to the use of such person or persons, and for such estate and estates, uses, trusts, intents, and purposes, and in such parts, shares, and proportions, manner, and form, with or without power of revocation, as they the said *R. Peach* and *T. Peach* should during their joint lives by any deed or writing, deeds or writings,

of two witnesses, appointed the land to *J. M.*, but the attestation indorsed on the deed, and subscribed by the witnesses, only specified that it was sealed and delivered by *R. P.* and *T. P.* in their presence, but not that it was signed: Held that this was not a due attestation as required by the power; and that a subsequent attestation by the witnesses, after the death of *R. P.*; certifying that the deed was signed as well as sealed and delivered in their presence, did not cure the defect in the original attestation.

under

under both their hands and seals, to be by them duly executed in the presence of, and to be attested by two or more credible witnesses from time to time, give, grant, convey, direct, limit, or appoint; and for want of, and until such gift, grant, conveyance, direction, limitation, or appointment should be made, to the use of the said *R. Peach* for his life, subject to an annuity, with remainder to the use of the said *T. Peach* for life, with several remainders over.

By indenture of the 7th of *June* 1799 between the said *R.* and *T. Peach* of the one part, and the said *J. Mansfield* of the other part, reciting the above-mentioned indentures and recovery, it was witnessed that in consideration of 5s. to *R.* and *T. Peach* paid by *J. Mansfield*, the said *R.* and *T. Peach* by force and virtue of the said recited power and authority, and of all and every other power in that behalf, by that, their deed and writing under both their hands and seals, attested by and duly executed in the presence of the two credible persons whose names were indorsed as witnesses thereto, did limit, declare, direct, and appoint the said premises to the use of the said *J. Mansfield*, his heirs and assigns, to hold to him, his heirs and assigns, upon certain trusts in the said indenture mentioned. This indenture was signed, sealed, and delivered by *R.* and *T. Peach*, in the presence of the two witnesses whose names are indorsed on the deed, but their attestation is in the following terms:

“ Sealed and delivered by the said *Robert Peach*,  
(being first duly stamped,) in the presence of

*Thomas Martin.*

*John Seale.*

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“ Sealed

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against  
PEACH.

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 Doe  
 against  
 Peach.

“ Sealed and delivered by the within named *Thomas Peach*, (having been first duly stamped,) in the presence of us,

*W. Heyrick.*

*John Billing.”*

A fresh attestation now appears on the deed, under the hands of the same witnesses in the following words:

“ We do hereby attest and certify, that the within written indenture at the time of the execution thereof by the within named *Robert Peach*, was signed as well as sealed and delivered, by the said within named *Robert Peach* in our presence. As witness our hands,

*Thomas Martin.*

*John Seale.”*

“ We do hereby attest and certify, that the within written indenture at the time of the execution thereof by the within named *Thomas Peach*, was signed as well as sealed and delivered, by the said within named *Thomas Peach* in our presence. As witness our hands,

*W. Heyrick.*

*John Billing :”*

but this attestation was not made until after the death of *R. Peach*.

The question for the decision of the Court is, whether, under the forgoing circumstances, the power contained in the deed of 30th of *September* 1782 was well executed by the deed of *June* the 7th 1799; if it were, the verdict to stand; if not, a nonsuit to be entered.

*Reader* for the plaintiff made the same two points in support of the validity of the execution that were made  
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in *Wright v. Wakeford* (a) viz. that the attestation was according to the power; or if not, that it was made good by the subsequent attestation; only upon the first point he endeavoured to draw a distinction between the two cases, from the difference in the wording of the respective powers in each. Here the power is, "by any deed or writing under their hands and seals, to be by them duly executed in the presence of, and attested by two or more witnesses;" it does not, therefore, require that the signing should be attested, but only that the execution should. It is true that the deed or writing must be under their hands and seals, and so the deed is; and it also appears upon the face of the attestation that it was duly executed in the presence of two witnesses; therefore the power has been strictly pursued. But in *Wright v. Wakeford* the power was, "by any writing under their hands and seals, attested by two witnesses," which could only mean that both signing and sealing should be attested, and one only was attested; therefore a very main distinction results from the different wording of the two powers. But supposing that distinction to fail, then he argued upon the same grounds and authorities that were relied on in *Wright v. Wakeford*, and from analogy to the statute of frauds respecting the attestation of wills (b), where the words being, that it "shall be attested and subscribed in the presence of the deviser," yet it is held that the attestation need not express that it was in the testator's presence; and in addition to *Brice v. Smith* (c), he cited *Hands v. James* (d), and *Croft v. Pawlet* (e). He also insisted upon the weight that was due to the opinion of the chief justice in *Wright v. Wakeford*.

(a) 4 Tapp. 213.

(b) 29 Car. 2. c. 3. s. 5.

(c) Willes, 1.

(d) Com. R. 531.

(e) Str. 1109.

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*Denman*, contra, denied the force of the distinction taken, because, he said, that here the meaning of the words "to be duly executed and attested" was that the deed should be executed with all the forms prescribed, and such forms attested; and one of those forms is, that it should be under the hands of the parties. And upon the main points he also referred to the arguments and authorities relied on in *Wright v. Wakeford*, and insisted that the opinion of the three learned judges in that case was of more weight upon the question of law than that of the chief justice, and that a substantial compliance with the power was not enough, but it must be pursued strictly.

At the conclusion, Lord *Ellenborough* C. J. said, that out of respect to the opinions of the learned persons before whom the question in *Wright v. Wakeford* was agitated and determined, as well as with a view of forming their own judgment in this case, the Court would take time to consider. The question seemed to be reduced to this, namely, what was the meaning of the words "to be duly executed" in this power, whether signing and sealing was meant by them, or only an execution in the ordinary sense of the word.

*Cur. adv. vult.*

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court in substance as follows: After having stated the facts of the case, and that the Court would consider it as a question upon a special verdict, (the parties having previously intimated their wish that it should be converted into a special verdict,) His Lordship said, the question for our decision is, whether under  
the

the foregoing circumstances the power contained in the deed of the 30th *September* 1782 was well executed by the deed of the 7th of *June* 1799; if it were, the verdict to stand; if not, a nonsuit to be entered. And the questions in this case are in effect these: 1st, whether the original attestation is good; and, 2dly, supposing it not to be good, whether it is cured by the subsequent attestation. As to the first, it has been attempted on the part of the plaintiff to distinguish this case from *Wright v. Wakeford*; it has been said, that as the power is worded here, the deed may be duly executed in the presence of two witnesses without the parties putting their hands and seals to it in the presence of the witnesses, and therefore the attestation may be good without its being extended to the signing of the parties. But it seems to us that to make a due execution of the power, there must be a making of an instrument with all the forms required by the power, and that there must be an attestation of its execution with all those forms. The intention of the parties was, that the attestation should be co-extensive with the things required to be done, and this makes the case directly the same as *Wright v. Wakeford*; upon which, notwithstanding the respect we feel for the opinion of the chief justice, we think that of the three other judges entitled to more weight, as being more consonant with the rules and principles of law. The objection is certainly not to be favoured; but if the question be whether it follows as a legal consequence that an attestation of the sealing and delivery of a deed is an attestation of the signing, we are bound to answer that it does not. The ground on which our opinion is formed, is so fully stated by the three judges in their

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certificate in *Wright v. Wakeford*, that it is not necessary to do more than refer to their opinion. Upon the other point, we think that it is not cured by the second attestation made after the death of one of the parties. It is not necessary to enter into the question at what precise time an attestation must be made; but it seems difficult, if not impossible, to say, that an attestation subsequent to the death of one of the parties should give an operation to their act, which it had not during the life of the parties. And upon this point also the case of *Wright v. Wakeford* is an authority.

*Postea* to the defendant.

*Monday,*  
*May 23d.*

Application  
 for a habeas  
 corpus under  
 the 43 G. 3.  
 c. 140. ought to  
 be made to a  
 judge out of  
 Court.

### GORDON's Case.

**G**ORDON was in custody in *Newgate* under a warrant of Lord *Ellenborough*, for not surrendering to a commission of bankruptcy. *Abbott* moved, upon stat. 43 G. 3. c. 140., for a habeas corpus to bring him before the commissioners of His Majesty's customs, to be examined touching a matter depending before them.

LE BLANC J. (the only judge in Court,) upon reference to the statute, thought that the application ought to be made to a judge out of Court, and so *Abbott* took nothing by his motion.

The KING *against* W. SMITH.*Monday,  
May 23d.*

**I**NFORMATION in the nature of quo warranto against the defendant for exercising the office of mayor of the borough of *Colchester*.

Plea,—that the King by letters patent (9th September 1763) constituted the borough of *C.* a free borough, and that the free burgesses should be a body corporate, by the name of the mayor and commonalty of the borough of *C.*, and by that name should have perpetual succession; and that there should be chosen out of the free burgesses one mayor, 11 aldermen, 18 assistants, and 18 common council; and that yearly, on the first Monday after the feast of the decollation of *St. John Baptist*, the free burgesses, or the major part of them, (except as in those letters patent was afterwards excepted,) should nominate two of the aldermen as for

Where a charter of incorporation, ordained that the mayor, &c. should yearly be chosen justices within the borough, and that the said justices should not permit any one to retail ale or beer within the borough, without a licence under the hands of two of the said justices, whereof the mayor to be one. Held that the defendant who was a dealer in spirituous

liquors, and by that means disqualified by 26 G 2 c. 13. from concurring in granting licences, was not disqualified from being elected mayor.

If defendant sets out a charter authorizing the election of a mayor in two instances only, viz. on the annual charter day and on the mayor's death within the year after he is sworn in, and pleads, that the office of mayor became vacant, without shewing how it became vacant, it cannot be intended that it was a vacancy within either of the instances named, nor that in instances not named there was to be an election in the mode prescribed in the instances named.

A mandamus directed not to a corporation by its corporate name, but to more persons than are by the charter required to do the thing enjoined by the mandamus, seems ill.

If a corporation consist of a definite number of aldermen, of whom the mayor is one, and it is pleaded that the office of mayor became vacant, it is not to be inferred from thence that the number of aldermen did not remain complete; and therefore the plea averring an election by the residue of the aldermen, which might consist of 10 or less according to the circumstance, whether the vacancy of mayor made a vacancy of alderman, it was held a good replication that only five attended; for it was matter of rejoinder that under the circumstances five were a majority: scus where it was pleaded that the mayor died, for there the presumption was, that there was a vacancy of alderman.

Where a charter authorized the election of a mayor on the charter day, with power to the mayor to hold over, and on the mayor's death within the year after his election and swearing in, and in the mean-time the alderman next in order to officiate as mayor: Held that in the case of a mayor's holding over and dying more than a year after his election and swearing in, the charter did not authorize a new election of mayor, nor the alderman next in order to officiate as mayor; but it was *casus omissus*.

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the mayor, and the residue of the aldermen or the major part, after that nomination, should elect one of the aldermen so nominated to be the mayor, who should be sworn in at the *Michaelmas* day following before the last mayor, and the residue of the aldermen, assistants, and common council, or so many of them as should be then present, of whom the last mayor, if living, to be one, and should afterwards execute the office of mayor for one year then next following, and thence until another person should be duly elected, preferred, and sworn, and so from year to year for ever; and if the mayor should die within the year after his election and swearing in, then at a convenient time, not to be protracted by unnecessary delays, the free burgesses, (except, &c.) or the major part of them, should nominate two of the aldermen, and the residue of the aldermen not named, or the major part, should elect and swear one of the aldermen so nominated to be mayor, who should exercise the office during the remainder of the year, and thenceforth until another person should be duly elected and sworn in, and in the mean-time, the alderman first in order after the mayor so dying, (who should be in the borough during the vacancy of such mayoralty,) should officiate as mayor, and so from time to time, as often as the case should so happen, for ever. The plea then stated, that the King nominated a person to be the first and modern mayor, other persons to be the 18 assistants, and the 18 common council, one to be the first high-steward, and another to be the first recorder, and that the person nominated as mayor should continue such until the next feast of the decollation, and until another mayor should be sworn in, and after his  
mayoralty

mayoralty should continue one of the aldermen next in order after the mayor during his life, unless removed for reasonable cause; that the then burgesses accepted the said charter, and that on the first of *January* 1813 the office of mayor being vacant, (not stating how or in what manner it became vacant,) one *Bridge* usurped the office, and that in *Hil. T.* 1813 an information in nature of quo warranto was exhibited against him for such usurpation, upon which judgment of ouster was given in that term; that on the 11th of *May* 1813 a mandamus issued, directed and delivered to the aldermen and commonalty of the borough of *C.*, which reciting (inter alia) the proceedings and judgment against *Bridge*, and that the office of mayor was then vacant, commanded the aldermen and commonalty of the borough, and every of them having a right to vote, or to do any other act necessary to the election of a mayor, on the 29th of *May* then instant, to assemble and proceed to the election of a mayor for the residue of one whole year, to be computed from the feast of *St. Michael* then last, according to the form of the charter, and that such of them to whom the same should of right belong, should administer the oath and admit the person elected; that on the 22d of *May* a notice in writing of holding the assembly was affixed at the *Moothall* in the borough, by the person who had been appointed for that purpose by this Court; that on the 29th of *May* an assembly of burgesses was duly held, at which *W. Argent* an alderman, and the person who having a right to vote was the nearest then present in office to the mayor, presided, and thereupon the free burgesses (except, &c.) nominated the defendant and one *W. Sparling* then being aldermen,

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men, and that the residue of the aldermen elected the defendant to be the mayor for the residue of one whole year, to be computed from the feast of *St. Michael* then last; that the defendant was duly sworn in before the said *W. Argent*, and the residue of the aldermen, assistants, and common council, and being so sworn was admitted for the residue of one whole year, &c. according to the exigency of the writ. By means of which several premises he became mayor, and exercised the office, &c. 2d plea did not differ in substance from the first. 3d plea, that on the day appointed by the charter in the year 1809, at an assembly held for the purpose of electing a mayor, the free burgesses duly nominated the defendant and *W. Phillips*, then being two of the aldermen of the borough, to the intent that the then mayor and the residue of the aldermen, or the major part, should elect one, and that they duly elected the defendant to be mayor for one year from *Michaelmas* next; that he was duly sworn in, and admitted into the office; and that after the defendant's election there was not any other person elected and duly sworn into the office, &c. 4th Plea, that on the charter day 1807 the free burgesses nominated *Thomas Hedge* the younger and *W. Phillips*, two of the aldermen, to the intent, &c. and that *Hedge* was elected mayor for one year from *Michaelmas* next, and from thence until another person should be elected; that *Hedge* was sworn in; that afterwards and before any other person was duly elected and sworn *Hedge* died, to wit, on the 1st *January* 1811, whereby the office of mayor became vacant, and that during the vacancy *Bridge* usurped and was ousted, and so the plea went on to allege the election of the

defendant under the mandamus, as in the first plea. The 5th Plea stated as in the 4th the election of *T. Hedge* the younger as mayor: his continuance in office and death on the 1st of *January* 1811; and that by the death of *Hedge* the office of mayor became vacant; that from *Hedge's* death until the supposed usurpation by the defendant no other person was elected into the office of mayor, and that the defendant was the alderman the first in order who was in the borough after the death of *Hedge*, and as such by virtue of the charter was entitled to officiate as mayor, and by that warrant he exercised the office, &c.

Replications to the 1st plea, after setting forth a provision in the said charter, which ordains that the mayor, recorder, the alderman who was last mayor, and two other aldermen, shall be yearly chosen and sworn justices of the peace within the borough, &c. and that the said justices should not permit any person to retail ale or beer, hopped or unhopped, within the borough without a licence in writing under the hands of two of the said justices, whereof the mayor was to be one; 1st (*a*), that at the time of the defendant's supposed election to the office of mayor there were present only five aldermen (naming them) of the borough, exclusive of the defendant and *Sparling*, the persons in the plea alleged to have been nominated, and that the defendant's election was made by these five aldermen only. 2dly, that the defendant, at the time of his nomination and election, was and still is a seller of and dealer in spirituous liquors, and interested in the said trade or business, whereby and by force of the

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(a) There were many replications concluding to the country, so that what are here given as the 1st and 2d replications to the 1st plea were on the record the 11th and 12th, and so of the rest.

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statute the defendant was and still is incapable, and had no power to grant any licence to any person for selling ale, beer, or any other liquors by retail, by reason of which premises the defendant was and still is disqualified from being nominated or elected to the office of mayor of the said borough, and from holding or exercising the same, or any of the liberties, privileges, or franchises belonging thereto.

Demurrer to these replications assigning for cause to the 1st, that it did not appear that the five aldermen therein mentioned, exclusive of the defendant and *Sparling*, were not the residue of the aldermen after the nomination in the plea alleged. Similar replications to the second plea, and to those replications similar demurrers.

Replications to the 3d plea, 1st, that only five aldermen, exclusive of the defendant and *Phillips*, the persons alleged in the plea to have been nominated, were present at the defendant's election, and that the election of the defendant was made by those five only; 2dly, that there were present at the nomination of the defendant and *Phillips*, only seven of the assistants; 3dly, that there were present at the nomination of the defendant and *Phillips* only seven common council-men; 4th, same as the last replication to the 1st plea.

Demurrer to these replications, assigning for cause, to the 1st, that it did not appear that the five aldermen therein mentioned, exclusive of the defendant and *Phillips*, were not the residue of the aldermen after the nomination in the plea alleged. To the 2d and 3d, that it did not appear by those replications that the seven assistants and seven common council-men therein respectively mentioned were not respectively the major parts of the assistants and common council-men for the time being, and also that

those replications are immaterial, inasmuch as it is not required by the charter that any of the assistants or common council-men should be present at any assembly to be held for the nomination and election of a mayor.

Replications to the 4th plea, similar to those pleaded to the first plea, and similar demurrers to these replications.

Replications to the 5th plea, 1st, that *Hedge* did not die at any time within the year, after he had been elected and sworn into office. 2d, same as the last replication to the 1st plea. Demurrer to these replications.

Joinder upon all these demurrers.

*Scarlett*, for the defendant, made several points upon these demurrers in support of the defendant's election; and 1st, as to the last replication to the 1st plea, which was pleaded also to each of the pleas, and which rested upon the ineligibility of the defendant to the office of mayor, by reason of his being a dealer in spirituous liquors, he denied that this was any objection to his eligibility. It is true that the stat. 26 G. 2. c. 13. s. 12. prohibits a justice of the peace who is a dealer in spirituous liquors from granting licences to sell ale or beer by retail, but it has no relation to corporate offices, and therefore though it would restrain the defendant as long as he continued such dealing from granting ale licences, it does not disqualify him from being elected mayor, being passed diversio intuitu. And though at the time of his election he be a dealer in spirituous liquors, it does not follow that he will continue so, when he enters upon the duties of his office. Besides, how can the Court take notice as a matter of law,

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law, that the office of mayor cannot be executed without exercising this function; non constat that in the course of his year there will be any occasion for a licence; and if there could be any doubt upon this statute, the 39 G. 3. c. 86. s. 3. has removed it, by enabling the justices for the county to act in such cases where the corporate justices are disqualified from acting. 2dly, Against the first replication to the 1st and 2d pleas, he argued thus: the plea alleges that the office of mayor was vacant, consequently there could be but 11 aldermen, from whom the two nominees being subtracted, five would be the majority of nine, the residue after the nomination; or if those words mean the residue at the time after the nomination has been made, not excluding the nominees, then five with the two nominees would be the major part of 11, the whole number. Perhaps, however, it may be said that it does not follow because the office of mayor was vacant that there must necessarily be a vacancy in the number of aldermen; that the mayor might cease to be mayor without ceasing to be alderman, so as to reduce the number to 11. But the office of mayor could only become vacant by death, or forfeiture, as by committing felony, &c., which would actually vacate the other, or by resignation, which it might be argued would be a virtual resignation of the other; but at all events the Court will intend that the vacancy happened in the natural course, by death, for which the charter makes provision; and if it were otherwise the replication ought to have gone farther, and stated that five were not the majority; for if there be any case in which five might be the majority, the Court will intend that case. 3dly, in support of the 1st and 2d pleas, to which it was objected

jected that the mandamus was misdirected (a), he argued, that supposing it should have been to the aldermen and commonalty, except as in the charter is excepted, and not to the aldermen and commonalty generally, yet the objection came too late after the writ had been executed; for which he cited *Rex v. Mayor of York* (b), *Rex v. Mayor of Rippon* (c), *Rex v. Bailiffs of Ipswich* (d); and in *Rex v. Mayor of Hereford* (e), where the mayor only was to admit, and the writ was directed to the mayor and aldermen, *Holt* C. J. (though the other judges differed) thought the word aldermen was surplusage, and the writ well enough. Also in *Rex v. Mayor of Abingdon* (f) *Holt* C. J. said, that "if the writ is directed to the corporation it is good; but if it be directed to those who by the constitution of the corporation ought to do the act, without doubt it is good also." And this being a mandamus after the stat. 11 G. 1. c. 4. it required the members or persons of the corporation having a right to vote or act to proceed to the election, and, therefore, notwithstanding any misdirection, could not go beyond the powers given by the act, so that no mischief could ensue from it. 4thly, against the 1st replication to the third plea, he contended that whatever the case might be when there was a vacancy in the office of mayor, yet it was clear that as long as there was a mayor there could be but 11 aldermen entitled to elect, and, therefore, in such case five must be a majority of the residue, after deducting the two nominees. The two next replications he insisted were immaterial, because the charter did not require the presence either of

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(a) The same objection also applied to the 4th plea.

(b) 5 T. R. 74.

(c) *Salk.* 433.

(d) *Ibid.* 434.

(e) *Salk.* 701.

(f) 1 *Ld. Rep.* 56a.

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the assistants or common council at the nomination; and these replications were abandoned on the other side. 5thly, against the 1st replication to the 4th plea, he said that here the plea alleged the death of the mayor as the cause of the vacancy, and therefore, whatever might be the case on the 1st plea, here it must be presumed that the office of alderman was also vacant, unless the contrary were shewn. And in support of the 4th plea, and in answer to the 1st replication to the 5th plea, which turned upon the same argument, he contended that the provision made in the charter, for the election of a mayor in the event of the mayor's death, as well as for the alderman first in order officiating as mayor in the interval, was not to be confined to the single case of the mayor's dying within the year. It may be urged, if the construction is to be according to the letter, that the charter says, if he should die "within the year after his election and swearing in;" but, according to the spirit and substance, that must mean within the year of his mayoralty, whatever year that may happen to be. The charter provides for his holding over until another is elected; if he holds over he commences a new year, and that becomes the year of his mayoralty, and so of every succeeding year which he shall happen to hold over, toties quoties; otherwise this inconsistency would follow that the charter which has carefully provided for the election of a mayor in one event of the mayor's dying, and for the mayor's holding over till another is elected, meant to make no provision at all in the event of his dying whilst so holding over. To maintain such a construction would be to hold that he was lawful mayor for one purpose and not for another. And here the mayor not being returning officer within the stat.

9 Ann.

9 *Ann. c. 20. s. 8.*, might be re-elected for the ensuing year, or what amounts to the same thing, might be continued without the form of an election; and can it be said that such second year would not be the year of his mayoralty as well as the first year? And supposing this to be a case unprovided for by the charter, yet the mandamus will cure it, because since the statute (a) the Court has power to interfere in the events stated upon the two first and fourth pleas; and even at common law, according to *Rex v. Mayor of Tregony* (b), the Court will compel an election upon the death or removal of the mayor in being; which applies to the fourth plea.

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*Richardson*, contra, upon the first point said, the intention was clear upon the words of the charter, that the mayor was to be an essential party to concur in granting licenses, and it was equally clear that the defendant came within that description of persons whom the stat. 26 G. 2. prohibited from so concurring. Therefore at the time of granting the charter the defendant could not have been elected mayor, because he was incompetent by reason of his dealing to perform all the functions of that office; upon the same principle that a person who fills one office, the duties of which are incompatible with another, cannot be elected to that other, or if he be elected, it will avoid his former office. And as to the possibility that he might cease to be a dealer, the answer is, that the corporate functions are not to be kept in suspense; and besides, the validity of his election depends not upon whether he may possibly qualify himself afterwards, but whether he be qualified or not

(a) 11 G. 1. c. 4.

(b) 8 *Mod.* 127. S. C. 112.

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at the time of election. As to stat. 39 G. 3. c. 86. its sole object was to supply a competent number of justices for the granting licenses, where corporate justices were incapable of acting, that the public revenue might not be injured. Upon the second point he maintained that the Court would intend *prima facie* that the corporation was full, and if so, the number of aldermen must be taken upon the first and second pleas to have been 12, because those pleas alleging merely that the office of mayor was vacant, it did not follow that that of alderman must be also vacant; and therefore the replication to those pleas which stated that only five aldermen were present, exclusive of the nominees, shewed that the election was not made by a majority. Upon the third point, he insisted, that as the mandamus was directed neither to the corporation by its corporate name nor to the persons who were to do the act, it was ill. The mandamus ought to pursue the words of the charter, and no words of equivalent import can be substituted, much less, where a charter introduces an exception, can words be sufficient which import that there is no exception. In *Rex v. Mayor of Hereford (a)*, Powell J. said, "writs ought to be directed to those, and to those only that are to obey the writ;" and that case is an authority to shew that if directed to more, the writ is bad. And as to this objection coming too late, the cases cited upon that point only go to this, that after a mandamus issued, and execution returned which is insufficient, those to whom it is directed shall not aver that the writ was misdirected, for that by the return they have admitted themselves to be the persons to whom it was directed. But that is a very different case from the present where

(a) *Salk.* 701.

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the objection arises upon a quo warranto. Upon the fourth point he admitted the replication was not an answer to the plea for the reasons urged on the other side. 5thly, He contended that the mayor was an essential and integral part of the elective assembly for the choice of a mayor, except in the case provided for by the charter, which was limited to the single event of the mayor's dying within the year from his swearing in; and in like manner also the power of the alderman first in order to officiate as mayor was limited to the same event; and such was not only the true construction of the words according to the letter, as it was admitted, but according to their fair and necessary import; and therefore the present was a case unprovided for by the charter. And he denied that the mandamus, supposing it to be well directed, would lie on stat. 11 G. 1. c. 4., except in case where no election is made, or one that is void, on the charter day or on the day after. And at common law, the Court held in *Rex v. Mayor of Tregony* (a) that they could not compel them to chuse a mayor on any other day than the charter day, though they added, unless upon the death or removal of the mayor in being; but it does not follow from thence that the Court meant that in all cases of death or removal they might interfere, but only that they might do so with reference to the charter then in debate.

*Cur. adv. vult.*

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court. This was an information in the nature of quo warranto, exhibited against the defendant as mayor of *Colchester*, to which the defendant pleaded five pleas. The first plea stated a

(a) 8 Mod. 129.

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charter of 3 G 3., incorporating the borough by the name of "the mayor and commonalty of the borough of Colchester, in the county of Essex," and appointed a mayor, who was also to be an alderman, and eleven aldermen, and provided for the election of a new mayor in two instances, viz. *upon the charter day*, or *upon the mayor's death within the year* after he had been elected, preferred, and sworn in. The charter day was the Monday after the decollation of St. John the Baptist, when the free burgesses (except as in the charter is excepted) were to nominate two of the aldermen, out of whom the mayor and residue of the aldermen were to choose one, the person chosen was to be sworn in on *Michaelmas* day following, and was to continue in office for one year then next following, "and from thence until another person should be duly elected, preferred, and sworn in." The provision in the charter for an election upon the death of the mayor *within the year* after he had been elected, preferred, and sworn in, required that at a convenient time after his death, not to be protracted by unnecessary delays, the free burgesses (except as in the charter were excepted) should nominate, and the residue of the aldermen not named, or the major part of them, should elect, and in the mean-time the alderman first in order after the mayor so dying should officiate as mayor. Whether the charter contains any provisions for filling up the office of mayor upon vacancies of other descriptions, viz. vacancies by resignation, amotion, or death after the year, or between the time of election and swearing in, or whether the two instances above specified, i. e. of the ordinary annual election, and of election upon the mayor's dying within the year, are

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the only instances in which the charter provides for filling up the office, the plea does not state, and of so much of the charter only as is stated in it can we judicially take notice, nor can we intend any thing further to be contained in it. The first plea then states that the office of mayor being vacant, one *Bridge* usurped, who was removed by a judgment of ouster, on a quo warranto information exhibited against him, and that a mandamus issued from this Court directed to the aldermen and commonalty, &c. enjoining them, and every of them having a right to vote, or to do any other act necessary to the election of a mayor, to assemble and proceed to an election; and that they accordingly assembled and elected the defendant. The second plea does not materially differ from the first already stated. To these pleas, there are two replications to which the defendant has demurred, one replication states, that only five aldermen were present at the defendant's election; the other, that the defendant was a dealer in and seller of spirituous liquors, and by that means disqualified from concurring in the licensing public houses, which is under the charter a necessary part of his duty as mayor. Upon this latter replication the Court intimated its opinion upon the argument, which it now confirms, that since the 39 G. 3. c. 86., this supposed ground of disqualification cannot at any rate form a valid bar to the defendant's election, and this replication, therefore, (which is also pleaded to each of the other pleas,) may be entirely dismissed from consideration. To these two pleas, the first and second, there are two objections; the one is, that it is not stated how the office of mayor became vacant, and therefore non constat that the vacancy fell within either



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of those cases in which the charter, as it is stated on the record, gives power to proceed to a new election; the other objection is, that the mandamus commanded the *aldermen and commonalty* to elect, and that this is not a command to the body by its corporate name; and as the plea imports, by the statement of the charter which it makes to that effect, that *some of the commonalty are excepted* from concurring in the nomination, the command in the mandamus extends beyond the persons who are entitled under the charter to concur in the election. There is also in this case the same objection which the first replication raises, viz. the want of a competent number of the aldermen required under the charter to elect; and we think that the first and last of these objections, if not the second also, (which respects the direction of the mandamus,) must prevail against the defendant. As to the first, the defendant sets out a charter which authorizes the filling up the office in the way it prescribes, in two instances, viz. on the annual charter day, and upon the mayor's death, within the year after the mayor was sworn in; but the defendant does not shew affirmatively, that there is any provision for filling up the office *in any other instance*, nor negatively, that there is not any such provision. Such a negative allegation might perhaps have raised the presumption, that in instances not named there was to be an election in the mode which is prescribed in the instances which are named; but the want of such a negative allegation precludes us from raising such a presumption. As to the mandamus, a direction of it to the corporation *by its corporate name*, notwithstanding the vacancy of the mayoralty, would certainly have been good, for that is the legal description of the body

as long as it continues to have any corporate existence at all; but where the direction is not to the corporation by its corporate name, it seems to us to be bad, if it extends beyond the persons who are required by the charter to concur in the particular thing commanded by the mandamus. But upon this objection, being clearly of opinion against the defendant upon the other two, it is not necessary to give a more conclusive opinion. As to the first replication, the plea states, that the office of mayor was vacant, and that the defendant and *Sparling* were nominated, and that the defendant was elected by the residue of the aldermen; the replication is, *that only five aldermen were present*. The plea not having stated that there was any vacancy in the body of aldermen, and the vacancy of the office of mayor not necessarily producing a vacancy amongst the aldermen, the presumption upon the plea is, that the body was full; the replication then that only five were present is *primâ facie* an assertion that the number necessary to constitute a majority of the aldermen was not present, and it became the duty of the defendant to shew by rejoinder, if he could, that from the then state of the corporation five constituted a majority, which at ordinary times, and in the natural and proper state of the corporation under the charter, it would not. We are therefore of opinion that, upon demurrer to the replications to the first and second pleas, there must be judgment for the crown. To the third plea there was no objection; and the ninth replication (*a*) to it, viz. that there were only five aldermen present at the election, is bad, because it appears there was a mayor also

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(a) So in the record, but the first in this report.

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present, who as well as the two nominees are to be deducted from the 12, and five are a majority of nine. The other two replications were disposed of upon the argument in favour of the defendant, and therefore upon the demurrers to those replications there must be judgment for the defendant. The fourth plea states an election of *Hedge* the younger as mayor in 1807, and that before any other person was elected and sworn into that office, *Hedge* died; that *Bridge* usurped and was ousted, and that the defendant was elected under a mandamus as in the first plea. To this plea there are the same replications as to the first, viz. that only five aldermen were present at the defendant's election, and that the defendant was a dealer in spirits. Upon this plea, therefore, the objections, that there was not such a vacancy upon *Hedge's* death as warranted a new election under the charter, (as the charter is set out,) and that the mandamus was improperly directed, apply. It is only upon a death within a year after being sworn in that the charter (as it is stated on the record) gives power to proceed to a new election, and this plea does not state that *Hedge* the younger died within the year after he was sworn in. The presumption is, that on the facts stated in this plea the vacancy of alderman continued, and therefore the replications on this plea are bad; but the plea also is bad, and there must on this account be judgment for the crown on this plea also. The fifth plea is, that *Hedge* the younger was elected on the charter-day in 1807, that before any other person was elected *Hedge* died, that no person has been elected since, and that the defendant, as alderman first in order, officiated from that time as mayor. To this, the replication is, that *Hedge* did not die

die within the year after he had been elected and sworn in; to which replication there is a demurrer; and the validity of this replication depends upon that part of the charter which gives to the alderman first in order the right of officiating as mayor when a mayor dies. That provision, as stated upon these pleadings, immediately follows the directions for filling up the vacancy where a mayor dies within his year, and is in these words, "and in the mean-time the alderman first in order after the aforesaid mayor so dying (who should be in the borough during the vacancy of such mayoralty) should officiate as mayor, and so from time to time as often as the case should so happen for ever." We have already seen that the death of a mayor, as contemplated by the charter, (as far as these pleadings state it, and for the supplying which provision is made by the charter,) is a death within the year, and the expressions in the part just stated of "the mayor so dying," and "as often as the case should so happen," appear to us in their literal and most obvious sense (and we do not see sufficient grounds in this case for adopting any other than the literal and obvious sense) to confine this clause to the case the charter had before been considering, viz. a death within the year. As the charter had provided for an annual election, it might presume that such election would always duly take place, and the chance of a death except in that year might not occur to the consideration of the framers of this charter, and might be, (as upon the charter as far as it is shewn to us it appears to be,) *casus omissus*. But as the whole charter is not set out, we cannot judicially say upon these pleadings that it may not contain other provisions in case of a death after the expiration of a year,

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year, and we do not feel ourselves warranted in extending the actual provision stated in these pleadings (which is expressly a provision in case of a death within the year, and nothing more,) to a death happening beyond that period. The consequence is, that upon the demurrer to this replication, there must be judgment against the defendant. Upon the several demurrers, therefore, to the replications to the first, second, fourth, and fifth pleas, there must be judgment for the crown, and on the demurrer to the replication to the third plea, for the defendant.

Monday,  
May 23d.

The KING *against* MORPHEW. (a)

The Court, upon application of the defendant, postponed the trial of an information for a misdemeanor, upon the defendant's consenting by writing under his own hand, to the examination upon interrogatories of a witness for the crown.

THE *Attorney-General* having filed an information for a misdemeanor for illegally transacting the sale of military commissions, the defendant had on former occasions obtained rules to postpone the trial on the alleged absence of material witnesses. In this term he renewed his application, which was now opposed on the part of the crown, on the ground of the defendant's laches. The Court inclined to the objection, and said that they would refuse to grant the rule unless the defendant would consent to the examination upon interrogatories of a material witness for the crown who was about to leave the country, the defendant signifying such his consent in writing under his own hand. Whereupon the *Attorney-General* suggested whether there might not be a doubt as to the reading of depositions so taken, in a criminal case; and he stated that no instance of the sort was recollected; and that

(a) We were favoured with this note by Mr. *Attorney-General*.

in the crown-office there did not exist a form of rule for such purpose.

Lord ELLENBOROUGH C. J. There is a precedent, though not in the crown-office, on the impeachment against Mr. *Hastings*. A gentleman who could not attend was examined on interrogatories, and Lord *Thurlow* was not likely to have consented to such a proceeding if any objection had existed against it.

The rule for putting off the trial was made absolute on such consent, to be signed and verified by affidavit.

*Holt* was in support of the rule.

#### YOUNG *against* GATIEN.

**E**SPINASSE shewed cause against a rule for discharging the defendant out of custody on filing common bail, which was obtained on the ground of the affidavit to hold to bail being defective. The affidavit was made by the servant of the plaintiff, and stated that the defendant, master or commander of the ship *Olive*, was justly and truly indebted to the plaintiff in 98*l.* and upwards for the work and labour of the plaintiff, and his workmen and servants, done and performed in and on board the said ship, and for the materials found and provided by the plaintiff, and used and applied therein, and also for goods sold and delivered, and money paid, laid out, and expended by the plaintiff, at the special instance and request of the defendant. The objection was, that the affidavit did not state that the work was done for the defendant, or the goods sold to, or the money paid

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An affidavit to hold to bail stating that defendant, captain of a ship, was indebted to plaintiff for work and labour of plaintiff done on board the ship, and for materials found by plaintiff, and used therein, and for goods sold and delivered, and money paid by plaintiff at the request of defendant, was holden to be defective in not stating that the work or money was done or paid for, or the goods sold to defendant.

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paid for the defendant. In answer to which he relied on *Coppinger v. Beaton* (a), where the Court refused to entertain a similar objection, saying there was no precise form of words necessary in an affidavit to hold to bail; that it was sufficient to allege that the defendant is indebted to the plaintiff in a certain sum of money, specifying the cause of action; and that it could not be said, that the defendant was indebted to the plaintiff unless the money had been received by the defendant. And here the affidavit goes farther, for it does state that it was at the defendant's special instance and request.

*Lawes*, contra, cited *Perks v. Severn* (b), *Cathrow v. Hagger* (c), and *Taylor v. Forbes* (d), where the Court had required a greater strictness, and in the latter case Lord *Ellenborough* C. J. said, "the strictness required is not only to guard defendants against perjury, but also against any misconception of the law by those who make the affidavits; and the leaning of his mind was always to great strictness of construction where the liberty of the party was concerned." It does not appear by the present affidavit that the work, &c. may not have been done for a third person.

LORD ELLENBOROUGH C. J. For work done on board the ship, is the cause of action stated in the affidavit; but does it result as a consequence from these premises that the defendant is indebted as captain? He only becomes liable upon his contract.

*Per Curiam*,

Rule absolute.

(a) 8 T. R. 338.  
 (d) 11 East, 315.

(b) 7 East, 194.

(c) 8 East, 106.

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PRIOR *against* MOORE.*Monday*  
*May 23d.*

THE plaintiff sued by attachment of privilege, and a rule was obtained for setting it aside, on the ground that he had been a prisoner in the King's Bench for above a year before the suing out of the writ, and also that his certificate had expired on the first of *November* last, and had not been renewed since.

An attorney may sue by attachment of privilege, though his certificate has expired, and not been renewed, if it be within a year from the expiration of his certificate, and though he has been in prison for above a year before the suing out of the writ.

*Marryat* shewed cause, and denied that the plaintiff was deprived of his privilege of suing as an attorney on account of his having been a prisoner as alleged; and as to the other objection that he had not taken out his certificate, he observed that by the stat. 37 G. 3. c. 90. s. 31., an attorney is not made incapable of practising unless he neglects to obtain his certificate for the space of one whole year.

*Comyn*, in support of the rule cited *Tidd's Pract. (a)*, "that the privileges of attorneys are confined to those who have practised within a year; for it is a rule that such as have not been attending their employment in the King's Bench for the space of a year, unless hindered by sickness, be not allowed their privilege;" which is founded upon a rule of *M. 1654*. And here the plaintiff is no longer attending the Court within that rule, and therefore no longer entitled to his privilege, which is the privilege of the client rather than of the attorney. Upon the other objection, he said

(a) 75. 5th ed.

that



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that 37 G. 3. c. 90. ss. 26. 28. require that he shall entitle himself to a certificate before he shall commence, carry on, or defend any action or suit, or any proceedings whatsoever.

*The Court* seemed to think that the statute related to the carrying on suits for other persons; and upon the other objection, Lord *Ellenborough* C. J. observed, that the rule upon which it was founded, was made during the time of the commonwealth, and unless it came within the saving clause of the statute (a) would not now be in force; and *Le Blanc* J. said it did not appear that it had been acted upon in any case. *Dampier* J. read the rule from the rule book, "that such attorneys as have not been attending their employment in this Court by the space of one year last past, unless hindered by sickness, be not allowed their privilege of attorneys," to which is subjoined in the rule book, *Lutwyche*, 1667, contra. And he added, that it seemed as if that rule only applied to the one year then last past.

*Per Curiam,*

Rule discharged.

Monday,  
 May 23d.

PENFOLD *against* HAWKINS.

A plea of set-off for money due on a recognizance and also for money due upon promises pleaded to an action of debt on bond as if to an action of assumpsit, was holden to be a nullity, and that the plaintiff might sign judgment.

DEBT on bond. Plea, that the plaintiff was indebted to the defendant in £. upon a recognizance in the Court of Exchequer, with a prout patet, &c.; and also in the sum of £. for work and labour, and money had and received to the use of the defendant, which said

(a) 12 Car. 2. c. 12.

several

several sums of £. and £. so due and owing from the plaintiff to the defendant, exceed the said several sums of money due and owing to the plaintiff on the said several supposed *promises* in the said declaration mentioned, out of which said several sums of money so due from the plaintiff to the defendant he is ready to set off so much as will be sufficient to satisfy the plaintiff the damages he has sustained by reason of the non-performance of the said *promises*, and undertakings in the said declaration, &c. The plaintiff having treated it as a sham plea, and signed judgment as for want of a plea,

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*Gifford* obtained a rule nisi for setting it aside.

*Comyn*, against the rule, maintained that the plea was a nullity, because it consisted partly of matter of record, and partly of matter in pais, to which any replication that could be pleaded would be double; and also because the plea was pleaded as if it were to an action upon promises. But in debt on bond, it is incumbent on the defendant to crave oyer, and set out what is justly due. (a)

The Court agreed that the plea might be treated as a nullity; and *Bayley J.* referred to *Blewitt v. Marsden*. (b)

Rule discharged. (c)

(a) Stat. 8 Geo. 2. c. 24. s. 5.

(b) 10 East, 237.

(c) See *Solomons v. Lyon*, 1 East, 269.

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Wednesday,  
May 11th. (a)

JOHN MARSHALL and WILLIAM CONGREVE MARSHALL, Clerk, against HILL.

Devise to the use of *J. C.* his brother for life, and from and after his decease to his first and other sons, according to their seniority of age and priority of birth; and if *J. C.* should die without such issue, and before they arrive at 21, then to the use of *J. M.* (eldest son of *T. M.* his brother-in-law), and his son or sons limited as aforesaid; and if *J. M.* should die leaving no son or sons as aforesaid, then to *J. M.* second son of *T. M.*, and his son or sons limited as aforesaid, and if the said *J. M.* should die, leaving no son or sons in the manner aforesaid, then to the use of his niece *A. M.*, her heirs and assigns for ever: Held that *J. C.* having died without issue, *J. M.* (the eldest son of *T. M.*) took an estate for life, and *W. C. M.* (his only son who had attained 21), took a vested indefeasible remainder in fee.

*WILLIAM Congreve, M.D.*, being seised in fee of certain lands, tenements, and hereditaments, and also seised of certain copyholds of inheritance in the county of *Salop*, part of which estates situate at *Bradney* were subject to a life-estate of *Margaret* his wife, and having surrendered his copyhold to the use of his will on the 20th of *October 1775* devised the same, both freehold and copyhold, in *Hilton, Bradney*, and in the manor of *Wyken*, and elsewhere, in the parish of *Worfield*, to his wife *Margaret*, without impeachment of waste during her natural life, and from and after her decease he gave the same (except as thereafter excepted) together with the reversion or reversions of all other lands in *Bradney*, which should come to him and his heirs upon the decease of his wife, to his brother-in-law *Thomas Marshall*, his heirs and assigns, to the use of his brother *J. Congreve*, for and during his natural life, and from and after his decease to his first, second, third, fourth, fifth, or sixth son or sons lawfully begotten, according to their seniority of age or priority of birth; and in case of no such son or sons arriving at the age of 21 years, then he gave the same to the use of *John Marshall*, the eldest son of the said *T. Marshall*, during his natural life, and after his decease to his first, second, third, fourth, fifth, or sixth son or sons in the manner as was before expressed; and

(a) Not having obtained a copy of the certificate in time to print this case in the order according to the date of its determination, we postponed it to the last.

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in case no such son or sons lawfully begotten should arrive at the age of 21 years, then he gave the same to the use of *James Marshall*, the second son of the said *T. Marshall* and his son or sons lawfully begotten in the manner aforesaid, and last of all, if the said *James Marshall* should die without issue to inherit as aforesaid, then he gave the same to the use of his niece *Ann Marshall*, her heirs and assigns for ever." And after charging his freehold lands in the manor of *Wyken* with the payment of certain sums of money, and giving certain pecuniary legacies and an annuity, and charging all his freehold lands in the parish of *Stotesden* with the payment of his debts, legacies, and annuity, in case his personalty should fall short, the testator devised as follows: "Item, I leave the same, subject to my debts, legacies, and annuity as aforesaid, together with the manor of *Delton* and all other estates in the parish of *Neen Savage*, subject to my wife's jointure, and aunt's annuity, to my brother *Thomas Marshall*; to the use of my brother *J. Congreve* during his natural life, and from and after his decease to his first, second, third, fourth, fifth, or sixth son or sons lawfully begotten, according to their seniority of age or priority of birth, and if my brother *J. Congreve* should die without such issue as aforesaid, and before they arrive at the age of 21 years, then to the use of *John Marshall* the eldest son of the said *T. Marshall* and his son or sons limited as aforesaid, and if the said *John Marshall* should die leaving no son or sons as aforesaid, then to the use of *James Marshall* the second son of the said *T. Marshall*, and to the use of the son or sons of the said *James Marshall* lawfully begotten and limited as aforesaid, and if the said *James Marshall* shall die

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leaving no son or sons in the manner aforesaid, then I leave all and every part of the aforesaid estates in the parishes of *Stotesden* and *Neen Savage* to the use of my niece *Ann Marshall*, her heirs and assigns for ever." The testator died on the 20th of *July* 1776 without issue, leaving *Margaret* his widow, and *J. Congreve* his only brother and heir at law and customary heir. *T. Marshall* and *Margaret Congreve* died; and *J. Congreve* also died without issue, leaving the plaintiff *John Marshall* the eldest son of *T. Marshall* his (the said *J. Congreve's*) nephew and heir at law and customary heir, and who thereupon became, and is the heir at law and customary heir of the testator. Before his death, *J. Congreve* devised all his right, title, and interest, both at law and in equity, in and to the several lands, tenements, and hereditaments, late of his brother *W. Congreve*, in the parish of *Neen Savage* and *Stotesden* to *Anne Ellison* in fee. The plaintiff *William Congreve Marshall*, the only son of the plaintiff *John Marshall*, has attained his age of 21 years. And upon agreement between him and his father on the one part, and the defendant *Hill* on the other, for the sale to the defendant of a part of the said lands in the parish of *Neen Savage*, and upon a bill filed by them in the Court of Chancery against the defendant, to compel a specific performance of that agreement, the Vice Chancellor directed the case to be stated for the opinion of this Court upon the following question:

What estate the plaintiffs *John Marshall* and *William Congreve Marshall* or either and which of them took, under the will of *Dr. William Congreve*, the testator, in the premises in question, in the events which have happened.

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*Horne* argued for the plaintiffs on a former day in this term, that under the last devise "to the use of *John Marshall* and his son or sons limited as aforesaid, and if the said *J. M.* should die leaving no son or sons as aforesaid then over," *J. M.* took an estate for life, and *W. C. M.* his son, a vested remainder in fee defeasible in the event of his dying under 21, but now become indefeasible by his having attained that age, or at all events that *W. C. M.* took an estate tail. He said it was clear upon the authorities, that an estate of inheritance might pass by a will, if such appeared to be the testator's intention, although neither the word heirs nor any other technical words of inheritance were used. 1st, Therefore he argued upon the general intention of the testator, that it was to provide, not for one or two persons only, but for successive generations, each succeeding the other in proximity to the testator, and consequently it was probable that he would observe the same limitations to them all; and so it appears he has done till he has exhausted the whole succession and come to the ultimate limitation to *Ann Marshall* in fee. That in the first set of limitations he meant to give the sons of the several takers for life some estate of inheritance is evident from this, that the ultimate remainder is limited to *Ann Marshall*, if *James Marshall* (the last taker for life, to whom and to whose sons he had limited it in the same manner as in the prior limitations) should die without issue to inherit as aforesaid, which clearly marks the testator's view of the effect of the preceding limitations. And in the same manner the limitations in the subsequent clause, being in the same order, and framed nearly in the same terms with those in the clause which goes before, may be explained by them.

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Therefore the devise in the subsequent clause "to *J. Congreve* for life and to his sons in succession, and if *J. C.* should die without such issue as aforesaid," may well be construed by reference to the former clause where the word issue occurs to mean issue to *inherit as aforesaid*, and by the same reference the next devise to *John Marshall* and his son or sons *limited as aforesaid*, and if he should die *leaving no son or sons as aforesaid*, may admit of the same interpretation. And if he had meant to give them only estates for life it appears he knew how to create such estates. But 2dly, upon the words of the devise itself it is clear that the sons of *J. Marshall* were to take a fee, because the deviser appointed that if they should die before they arrived at 21, the estate should go over; for which reason, according to the opinion of *Saunders* in *Purefoy v. Rogers* (a), it must be intended that the deviser gave the sons a fee. And though it may be said that the opinion of *Saunders* was founded on this, that the deviser appointed the remainder over to his own right heirs, yet the same has been held in subsequent cases where the remainder was not so limited; *Moone v. Heaseman* (b), *Frogmorton v. Holyday* (c), *Tomkins v. Tomkins* (d), and *Doe v. Cundall* (e); and the reason is, for that a giving over on a dying before 21 shews an intention that if the party attain 21 he should have a fee absolute.

*Denman* contra, insisted that *W. C. M.* took only for life, or if he took an estate in fee or tail, it was on a double contingency, viz. his attaining the age of 21 and surviving his father; wherefore he concluded that *J. M.*

(a) 2 *Saund.* 388.(b) *Willes*, 138.(c) 3 *Burr.* 1618. *S. C.* 1 *Black, R.* 535.(d) Cited in 1 *Burr.* 234.(e) 9 *East*, 400.

his

his father being still alive, the vesting of the son's estate must await the contingency of the father's death. 1st. That a fee-simple may pass by a will without words of inheritance, if the intent of the testator plainly appears, may be admitted; but there is no such intent apparent on this will, and if, as it has been said, the testator knew how to give life estates, it appears also he knew how to use apt words for passing a fee; so that the presumption arising from the want of words to designate the estate is as strong on one side as on the other. And here are no general introductory words indicating an intention to dispose in all events of the whole property, nor is there any charge on the devisees in respect of the estate devised to them, so as to raise a fee by implication; nor is it a devise of the testator's estate, but only of his lands and tenements. And as to the expression to *inherit as aforesaid*, that clearly means no more than *take*, it cannot mean inherit in its proper sense, for whatever estate the sons might take, it cannot be doubted that they would not inherit, but take only by purchase. Besides there is no reason for referring the last devise to *John Marshall* and his sons, &c. to a more distant clause in the will, for the purpose of connecting it with the word inherit, when its more natural reference is to the next antecedent devise to *J. Congreve* and his sons, which has no such word. Then secondly, as to the devise itself, the deviser has not appointed, as is supposed, that the lands shall go over if the sons of *John Marshall* should die under 21, but if *J. M.* should die leaving no son or sons *as aforesaid*, i. e., by reference to the next antecedent devise, *and before they arrive at 21*; so that the estate of *W. C. M.*, the son, is to depend upon the contingency of his surviving

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his father as well as attaining 21. Thus in *Pells v. Brown* (a), a devise to *T.* and his heirs for ever, and if *T.* died without issue leaving *W.*, then to *W.* and his heirs, was holden to be a limitation of the fee to *W.* by way of executory devise, upon the contingency of *T.*'s dying without issue in the life-time of *W.* So in *Porter v. Bradley* (b), a devise to *P. D.* and his heirs, but in case *P. D.* should happen to die leaving no issue behind him, then over, was held to mean leaving no issue at the time of his death; and Lord *Kenyon* said that if only the first words "leaving no issue" had been used, they, according to the opinion of Lord *Macclesfield* in *Forth v. Chapman*, must be restrained to leaving issue at the time of his death. And so it appears in *Roe v. Jeffery* (c), a devise over "in case *T. F.* should depart this life and leave no issue" was confined to a failure of issue at the death of *T. F.* the first taker. And *Denn v. Bagshaw* (d) is to the same effect, though the construction worked a great hardship in that case. The opinion of *Saunders* in *Purefoy v. Rogers* was founded merely on the intention which he made from the remainder, being given to the right heirs of the devisor, if the son should die under 21; and in *Moone v. Heaseman* the devisee was charged with the payment of a sum in gross, which of itself carried a fee. Again in *Frogmorton v. Holyday* there was an introductory clause, shewing that the testator did not mean to die intestate as to any part, and on that the Court relied; and lastly in *Doe v. Cundall* the devise was to two, and if either should die under twenty-one, the survivor to be heir to the other; so that all those cases afford a distinction.

(a) *Cra. Jac.* 590.  
 (c) 7 *T. R.* 589.

(b) 3 *T. R.* 143.  
 (d) 6 *T. R.* 512.

*Horne* in reply, denied that there was any case where the words "leaving no issue" being coupled with such words as in the present case, "and before they arrive at 21" had been restrained to leaving issue at the time of the devisee's death; the cases cited were where the words "leaving issue," or "leaving issue behind him" were the only words to point out the time.

1814.

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 MARSHALL  
against  
HILL.

Lord ELLENBOROUGH C. J., observed that the meaning of *leaving* in this devise seemed to be *having had*, and not leaving in its ordinary sense; and *Bayley J.* added that the language of the Court on this point in *Moone v. Heaseman* was extremely strong, for *Willes C. J.* said, "that if there were any doubt on the words which charged the devisee with the payment of a gross sum, the subsequent words "in case all the three daughters die before their mother, that it shall descend to the heirs of the mother" had put it beyond all dispute, and plainly shewed the intention of the testatrix. For if she intended that the daughters should be only tenants for life, and consequently that it should go to the heirs of the mother, whether the daughters died before their mother or not, it would have been most absurd in her to say that it should go to the heirs of the mother in case the daughters die before her. And that was exactly agreeable to what was said by *Saunders* in *Purefoy v. Rogers*, of which he approved." And *Bayley J.* farther observed that in *Moone v. Heaseman* the limitation over was not to the right heirs of the devisor, but of his sister.

*Cur. adv. vult.*

The following certificate was sent:

We have heard this case argued by counsel, and are of opinion that in the events which have happened,

1814.

**MARSHALL**  
against  
**HILL.**

*John Marshall* took an estate for life, and *William Congreve Marshall* a vested indefeasible remainder in fee in the premises in question, under the will of Doctor *William Congreve*.

**ELLENBOROUGH.**

**S. LE BLANC.**

**J. BAYLEY.**

**H. DAMPIER.**

*May 11th, 1814.*

### MEMORANDUM.

Mr. Serjt. *Vaughan* took his seat within the bar as solicitor to her majesty, a few days before the end of this term.

**END OF EASTER TERM.**

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the

the letters of S. (the agent,) and letters of plaintiffs, as the deponent believes, was holden not to be sufficiently certain to shew a conversion; and therefore the Court discharged defendant on common bail. *Molling and Others, Assignees of White and Others, (bankrupts) v. Buckholtz, E. 54 G. 3.* Page 563

5. A supplemental affidavit cannot be used to cure a defect in the affidavit to hold to bail. *ib.*
6. An affidavit to hold to bail, stating that defendant, captain of a ship, was indebted to plaintiff for work and labour of plaintiff, done on board the ship, and for materials found by plaintiff, and used therein, and for goods sold and delivered, and money paid by plaintiff at the request of defendant, was holden to be defective, in not stating that the work or money was done or paid for, or the goods sold to defendant. *Young v. Gation, E. 54 G. 3.* 603

### AGREEMENT,

*See* **INFANT.—STAMP, 2. TROVER.**

Where plaintiff, the drawer of a bill of exchange accepted by defendant, agreed with him and the rest of his creditors, to take a composition of 8s. in the pound to be secured by promissory notes, to be given by defendant, payable on days certain, and that defendant should assign to the creditors certain debts, upon which they should execute a general release; and the assignment was executed, and all the creditors, except plaintiff, received their composition, and executed the release, and plaintiff might have received his promissory notes if he had applied for them; but it did not appear that defendant had ever tendered

### ATTACHMENT.

them to plaintiff, or that he had ever applied for them; and the plaintiff afterwards, and after the days of payment of the promissory notes had expired, sued the defendant on the bill of exchange: held that he was not precluded by the agreement from recovering. *Cranley v. Hillary, M. 54 G. 3.* Page 120

### ALLOTMENT,

*See* **INCLOSURE ACT, 2, 3.**

### ANNUITY,

*See* **INSOLVENT DEBTOR, 2.**

### APPEAL,

*See* **INCLOSURE ACT, 1.**

An appeal to the next sessions after an inclosure made by virtue of an inquisition taken on a writ of ad quod damnum is too late, if those sessions be not the next after the inquisition taken and entered and recorded at the sessions; therefore, where the sessions dismissed such appeal as being out of time, this Court refused a mandamus to them to enter continuances, &c. *The King v. The Justices of Bucks, M. 54 G. 3.* 230

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### ASSUMPSIT,

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### ATTACHMENT,

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An attachment against the sheriff for not bringing in the body after the defendant has surrendered, is irregular,

irregular, though the surrender be not made until after the rule for bringing in the body has expired. *The King v. The Sheriff of Middlesex, in a cause of Henderson v. Van Wrede, E. 54 G. 3.* Page 562

## ATTESTATION,

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## ATTORNEY.

1. The solicitor under a commission of bankruptcy is not liable in the first instance to the messenger, whom he nominates, for his bill of fees; but if the solicitor agree with the petitioning creditor to work a commission for a sum certain, and receive a great part of that sum, he will be liable to such messenger. *Hartop v. Jukes, E. 54 G. 3.* 438
2. An attorney may sue by attachment of privilege, though his certificate has expired, and not been renewed, if it be within a year from the expiration of his certificate, and though he has been in prison for above a year before the suing out of the writ. *Prior v. Moore, E. 54 G. 3.* 605

ATTORNEY, WARRANT OF,  
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## AUCTION,

See STAMP, 2, 3.

## AVERAGE, PARTICULAR,

See INSURANCE, 9.

## BAIL,

See AFFIDAVIT, 1, 3, 4, 5, 6.  
PRACTICE, 6.

Where bail in error was put in in vacation, and excepted to, and the plaintiff in error gave notice that

they would justify on the first day of next term, and before that day non proessed his own writ of error, and the bail did not justify: held that the bail were not entitled to stay proceedings in an action against them upon the recognizance, nor to have an exoneretur entered on the bail-piece. *Dickenson, Executrix of Hunt v. Heseltine, M. 54 G. 3.* Page 210

## BANKRUPT,

See ATTORNEY, 1. COVENANT. EVIDENCE, 5. FACTOR, 2. PLEADING, 1. 3. 9. SURETY.

1. Money given by a father, who is a trader, to his son, to advance him in a partnership trading concern, is not within 1 Jac. 1. c. 15. s. 5., and cannot be recovered from the son by the assignees of the father, who afterwards becomes bankrupt. *Kensington, Assignee of Thomas Chantler, a Bankrupt, v. T. Chantler the younger, M. 54 G. 3.* 36
2. A debt due on a judgment signed in an action for damages after an act of bankruptcy committed by defendant, and a commission issued thereon, is not discharged by the certificate, though the verdict was obtained before the bankruptcy. *Buss v. Gilbert, M. 54 G. 3.* 70
3. A debt for money lent due to a creditor at the time when an act of bankruptcy is committed by the debtor is sufficient to support a commission against him, though afterwards, and before petitioning for such commission, the creditor obtains judgment against him for a sum of money including such debt; and the affidavit made in order to obtain the commission may be an affidavit of debt for money lent. *Bryant v. Wühers, M. 54 G. 3.* 123

4. A bank-

4. A bankrupt cannot be permitted in an action brought by him to try the validity of the commission to plead a prior act of bankruptcy, and a sufficient petitioning creditors' debt existing at that time to support a commission, in order to defeat the subsisting commission.

Page 123

5. The bargain and sale by the commissioners to the assignees of a bankrupt of the bankrupt's freehold lands, does not relate to the act of bankruptcy so as to vest the title in the assignees from that time, and, therefore, in ejectment by the assignees upon a demise laid, after the act of bankruptcy but before the bargain and sale, adjudged ill. *Doe d. Esdaile and Others v. Mitchell and Another, E.* 54 G. 3. 446

6. The stat. 46 G. 3. c. 135. s. 2. does not restrain a creditor from proving under a commission of bankrupt, a debt contracted before the act of bankruptcy, on which the commission issued, but after notice of a prior act of bankruptcy. *Ex parte Bowness in the matter of Phillips a Bankrupt, E.* 54 G. 3. 479

7. Where one of three partners in a banking concern who resided at the place where the banking house was, and was the only partner who transacted the business, the other two residing at a distance from it, absented himself from the banking house, shut it up and stopped payment: Held that this was not evidence of a joint act of bankruptcy by all three. *Mills Assignee of E. Chambers and Others, Bankrupts, v. Bennet, E.* 54 G. 3. 556

8. The defendant, though he has given no notice that he intends to dispute the proceedings under the commission, may nevertheless give

evidence to disprove the act of bankruptcy. Page 556

## BARGAIN AND SALE,

See BANKRUPT, 5.

## BARON AND FEME,

See HUSBAND AND WIFE.

## BARREN GROUND,

See TITHES.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A bill of exchange drawn and issued in blank for the name of the payee may be filled up by a bona fide holder with his own name, and will bind the drawer. *Cruchley v. Clarence, M.* 54 G. 3. 90
2. Husband and wife may sue on a promissory note made to the wife during coverture. *Philliskirk and Susannah his wife v. Pluckwell, H.* 54 G. 3. 393

## BILLS OF LADING,

See FREIGHT.

## BOND,

See GUARANTIE. SURETY.

1. A bond conditioned for the payment, by quarterly payments, of an annual rent, is within the 48 G. 3. c. 149. sched. part 1. which imposes a duty on bonds given as a security for the payment of any definite and certain sum of money, and must be stamped accordingly. *Attree v. Anscomb and Others, M.* 54 G. 3. 88
2. A bond made by defendant as surety for E., with a condition reciting that E. had been and still was collector of the land-tax, and all other taxes and duties imposed by several acts of parliament on the

the inhabitants of the parish of C., by means whereof he had received from the inhabitants divers sums of money, and conditioned for the due payment by E., from time to time and at all times thereafter, to the receiver-general of taxes, &c. all and every sum which he (E.) should from time to time collect and receive from the inhabitants of the parish for or on account of any tax or taxes then imposed, or which should or might thereafter be imposed on them by any act of parliament, was held to be confined to the current year for which E. was, at the date of the bond, collector, although it did not appear on the condition that he was only appointed for a year, it being shewn by the defendant's plea that the said office of collector was by the act of parliament an annual office, and held as such by E. at the date of the bond, although by the replication it appeared that E. held the office not only for that year, but from thence to the time of exhibiting plaintiff's bill. *Hassell and Clark, Survivors of Savignac and Patch, deceased, v. Long and Another, Executors of S. Long, H.* 54 G. 3. Page 363

## BRIDGE,

See EVIDENCE, 4.

1. A bridge may be a public bridge, which is used by the public at all such times as are dangerous to pass through the river. *The King v. the Inhabitants of the County of Northampton, H.* 54 G. 3. 262
2. Where a person about 45 years back erected a mill and dam there-to for his own profit, *per quod*, he deepened the water of a ford through which there was a public highway, but the passage through which was, before the deepening, very inconvenient at times to the

public, and the miller, afterwards built a bridge over it, which the public had ever since used: Held that the county and not the miller were chargeable with the reparation. *The King v. the Inhabitants of the County of Kent, E.* 54 G. 3. Page 513

## BROKER,

See FACTOR, 2. INSURANCE, 10. SET-OFF, 1, 2.

## BYE-LAW.

A bye-law made by the freemen of a company of oyster fishermen, prohibiting any freeman from being engaged in the trade of sending oysters to market from any other ground on the *Kentish* shore than the oyster-ground of the company, under a penalty of 10*l.*, and in case of refusal to pay the same, that such freeman shall thenceforth and until the fine be paid be excluded from all share of the profits to be made thereafter by the joint trade of the company, is a void bye-law, there being no usage stated to that extent, but only an usage for the freemen to make orders for regulating the company and fishery, with fines and penalties for the breach of such orders, and for prohibiting the freemen from being engaged in other oyster-grounds under penalties to be stopped out of the money arising by the sale of the stint of oysters of such freemen. *Adley v. Reeves, M.* 54 G. 3. 53

## CANDIDATE,

See HUSTINGS.

## CARRIER.

A carrier who had given notice that he would not be liable for loss or damage unless occasioned by the actual



actual negligence of the master or mariners, was held not to have waived that notice by having on former occasions made allowances to the plaintiffs for damage, without enquiring into the cause of such damage. *Evans and Another v. Soule*, M. 54 G. 3. Page 1

### CERTIFICATE,

See **BANKRUPT, 2. COVENANT. SETTLEMENT — by Hiring and Service, 2. SETTLEMENT — by Certificate.**

### CHARTER-PARTY,

See **FREIGHT.**

### CODICIL.

A codicil signed by the testator and attested by three witnesses "to be taken as part of his will," is a republication of the will so as to make the will pass lands contracted for before, but conveyed between the date of the will and codicil. *Goodtitle, on the demise of Edward Woodhouse, and James Thomas, and Ann his Wife v. John Meredith*, M. 54 G. 3. 5

### COMPOSITION,

See **AGREEMENT.**

### CONSTABLE,

See **TRESPASS.**

### CONTRACT,

See **INFANT. PLEADING, 1. SALE. FRAUDS, Statute of.**

### CONVICTION.

1. A person who was the servant of B. and A., mast-makers, at weekly wages, was not considered as liable to a penalty under the 2 G. 2. c. 26. s. 4. for rowing on the Thames not being qualified, &c. for hire and

gain, by reason that he was in a skiff rowing and towing some articles of his masters' manufacture to a ship in the river, having been sent by them with their apprentice to assist him in some work on board the ship, and not being to receive any thing in addition to his wages for going thither or rowing the skiff to the ship; and therefore the Court quashed the conviction. *The King v. Hobson*, M. 54 G. 3. Page 145

2. *S. P. Rex. v. Taylor, E.* 30 G. 3. 147 n.

### COPYHOLD,

See **EVIDENCE, 3. — WASTE.**

A person claiming to be admitted as heir to a copyhold need not tender himself to be admitted at the Lords' Court, if the Steward, upon application to him out of Court, has refused to admit him. *Doe d. J. Burrell v. Bellamy and Another*, M. 54 G. 3. 87

### CORPORATION,

See **QUO WARRANTO, passim.**

1. It is necessary that a presiding officer, who by the charter of a borough forms an integral part of an elective assembly, should be present up to the time when the election is completed, and the election cannot be proceeded in during his absence, although he should improperly absent himself. *The King v. G. Williams*, M. 54 G. 3. 141
2. A charter which requires that the mayor should be an inhabitant resident within the borough on pain of forfeiting such sum as should be imposed by the mayor, recorder, and major part of the common council, not exceeding 100*l.*, does not

not require residency as a qualification for holding the office, but only under a penalty. Page 141

3. An election of *A.* to a corporate office in place of a supposed vacancy created by *B.*, cannot be referred to an existing vacancy created by *C.* *The King v. Smith, H. 54 G. 3.* 406

## COSTS.

1. On a joint plea of not guilty to trespass and assault, if one defendant be found guilty, with 1s. damages and 1s. costs, and the other acquitted, the latter is only entitled to 40s. costs. *Hughes v. Chitty and Pontland, M. 54 G. 3.* 172
2. This Court will not refer it to the master to tax the plaintiff his costs in error in parliament on a judgment affirmed on error in Dom. Proc. without awarding costs, and remitted to this Court to the end that such proceedings may be had thereon as if no such writ of error had been brought. *Beale v. Thomson, M. 54 G. 3.* 249
3. The plaintiff is not entitled to costs to the time of defendant's paying money into court after the defendant has obtained judgment as in case of a nonsuit. *Crosby and Another v. Olorenshaw, H. 54 G. 3.* 335
4. It is too late for the defendant in the term after judgment signed and execution levied, to apply to enter a suggestion on the court of conscience act to deprive the plaintiff of his costs, if he could have applied in the same term. *Watchorn v. Cook, H. 54 G. 3.* 348

## COUNTY,

*See BRIDGE. HEREFORDSHIRE.*

## COVENANT,

*See LEASE, 1.*

Where upon a dissolution of partnership between three partners, two of the three assigned to the other all their shares in the partnership debts and effects, and the other covenanted to pay all debts then due from the partnership, and to indemnify the two from the payment of the same, and from all actions and costs by reason of the non-payment of the same, and afterwards became bankrupt, and a commission issued against him, under which he obtained his certificate, and afterwards the holder of a bill accepted by the three partners, and due before the dissolution of the partnership, sued the two, and they were obliged to pay the bill: Held that by stat. 49. G. 3. c. 121. s. 8. the certificate might be pleaded in discharge of an action brought by the two against the other upon his covenant. *Wood and Another v. Dodgson, M. 54 G. 3.* Page 195

## CUSTOM,

*See EVIDENCE, 3.*

## CUSTOMARY ESTATES,

*See EVIDENCE, 6. INCLOSURE-ACT, 2. TROVER.*

## DEBTOR AND CREDITOR,

*See AGREEMENT.*

## DEMAND,

*See LEASE, 4.*

## DEVIATION,

*See INSURANCE, 1.*

## DEVISE.

1. Devise of all and singular other his freehold, copyhold, and leasehold messuages,

- messuages, farms, lands, tenements, and hereditaments whatsoever and wheresoever, not before devised, equally between *W.* and *T.* for their joint lives, remainder to the children of *M.* and their heirs male and female, was held to pass a life estate to *W.* and *T.* in the after-purchased lands, notwithstanding a subsequent devise of "all the rest and residue of all his real estate not before disposed of, and all other his estates and interests whatsoever vested in him as mortgagee or trustee under any deed, or will, or otherwise howsoever, and of all the rest and residue of his personal estate to his wife, her heirs, executors," &c. *Goodtitle v. Edward Woodhouse, and James Thomas and Ann his wife v. John Meredith, M.* 54 G. 3. Page 5
2. Devise of a reversionary estate in a messuage, &c. to the testator's wife for the term of her natural life, and from and after her decease to the heirs of her body by the testator lawfully begotten, or to be begotten; and for want of such issue remainder over; the wife is tenant in tail after possibility, after the period from her husband's death, when she might have had issue by him, though there never was any issue of the marriage. *H. Platt and Mary his wife v. Powles, M.* 54 G. 3. 65
3. Devise of all his real and personal estate wheresoever and whatsoever equally to his sisters *M.* and *E.*, or to the survivor of them, and to be disposed of by the survivor as she may by will devise: held that the sisters did not take as tenants in common fee; nor supposing them to be tenants in common for life with a contingent remainder in fee to the survivor, or with a power to the survivor to dispose of the fee by will, was it

- such a contingent remainder as was deviseable by a will made by one in the lifetime of both the sisters, or was the power well executed by such will. *Doe d. Calkin and Others v. Tomkinson and Others, M.* 54 G. 3. Page 165
4. Devise of "all and singular my effects of what nature or kind soever," will not pass the real estate, where it cannot be collected from the will itself that such was the testator's intention. *Doe d. Eliz. Hick v. Dring, E.* 54 G. 3. 448
5. Devise to the use of *J. C.* his brother for life; and from and after his decease to his first and other sons, according to their seniority of age and priority of birth; and if *J. C.* should die without such issue, and before they arrive at 21, then to the use of *J. M.* (eldest son of *T. M.* his brother-in-law), and his son or sons limited as aforesaid; and if *J. M.* should die leaving no son or sons as aforesaid, then to *J. M.* second son of *T. M.* and his son or sons limited as aforesaid, and if the said *J. M.* should die leaving no son or sons in the manner aforesaid, then to the use of his niece *A. M.*, her heirs and assigns forever: Held that *J. C.* having died without issue; *J. M.* (the eldest son of *T. M.*) took an estate for life, and *W. C. M.* (his only son who had attained 21), took a vested indefeasible remainder in fee. *Marshall v. Hill, E.* 54 G. 3. 608

## EJECTMENT,

See BANKRUPT, 5.—LEASE, 5.  
NOTICE.

## ELECTION,

See CORPORATION, 1. 3.

## ERROR,

ERROR, WRIT OF.

1. A writ of error may operate as a stay of proceedings, though sued out before interlocutory judgment. *Emanuel v. Martin*, *H. 54 G. 3.* Page 334
2. The Court refused to set aside an execution issued pending a writ of error, where after judgment against defendants, their attorney proposed to give a cognovit for the debt and costs payable at a future time, and offered to sign it, observing that it would save expence to the parties, as he should otherwise be under the necessity of bringing a writ of error to obtain the time he had requested in the cognovit, for that he must obtain time. *Spooner and Others v. Garland and Others*, *E. 54 G. 3.* 474
3. Where defendant on being served with process declared to plaintiff's attorney he could not pay, that it was useless to go on with the action, as he would delay all he could, and when he had got judgment, would bring a writ of error, and put it off all in his power, and afterwards brought a writ of error, and on the plaintiff's proceeding to execution, requested him to keep it secret, and acknowledged that he had shewn him lenity, and requested that he might pay the money by instalments: held that the defendant had admitted that the writ of error was for delay, so as to prevent its being a super-seedeas. *Hawkins v. Snugs*, *E. 54 G. 3.* 476

ESCAPE.

The nominal plaintiff in ejectment, in whose name the mesne profits have been recovered, may sue for an escape of the defendant in ex-  
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ecution for such mesne profits. *Doe v. Jones*, *E. 54 G. 3.* Page 473

EVIDENCE,

See BANKRUPT, 7. 8. SETTLEMENT BY CERTIFICATE. STAMP, 2. VENUE.

1. The undertaking of the plaintiff upon the usual rule for bringing back the venue to *Middlesex*, is satisfied by the production of the commission of bankruptcy attested at *Westminster, Kensington, Assignee of T. Chantler, a bankrupt, v. T. Chantler the younger*, *M. 54 G. 3.* 36
2. A notice to quit in writing, signed by the party giving it, and attested by a witness, must be proved by calling that witness, or his absence must be accounted for; proof that it was served on the tenant, that he read it, and did not object to it, is not sufficient. *Doe d. Sir F. Sykes, R. Benyon v. Durnford*, *M. 54 G. 3.* 62
3. A single instance of a surrender in fee by tenant in special tail of a copyhold estate, is evidence to prove a custom within the manor to bar entails by surrender, though the surrenderor has not been dead twenty years, and though one instance be proved of a recovery suffered by tenant in tail to bar the entail. *Roe d. Bennett v. Jeffery*, *M. 54 G. 3.* 92
4. Upon not guilty to an indictment against the inhabitants of a county, for not repairing a public bridge, it is competent to the defendants to give evidence of the bridge having been repaired by private individuals. *The King v. The Inhabitants of the County of Northampton*, *H. 54 G. 3.* 262
5. In an action by a bankrupt against the petitioning creditor to try the validity of the commission, proof that

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- that the bankrupt and petitioning creditor attended the second meeting of the commissioners, and discussed before them the debt due to the petitioning creditor, and produced their accounts, and that the bankrupt objected to part of the petitioning creditor's account, and the commissioners ticked off such items in it as they allowed, and struck a balance of 169*l.*, was held to be evidence to be left to the jury of an implied admission by the bankrupt, from his conduct and demeanour before the commissioners, that such a balance was due, but not of an adjudication by them by their own authority, or of an award made by them with the consent of parties; and therefore where it had been so left to the jury, the Court granted a new trial. *Jarrett v. Leonard*, *H. 54 G. 3.* Page 265
6. Evidence that the tenants of defendant's estate for thirty years and upwards had publicly, and without interruption from the lord and with his knowledge, cut and sold the planted woods on the estate in large quantities, was held to be admissible in this case, and therefore a new trial was granted; but evidence of reputation that the tenants of defendant's estate had the right of cutting and selling planted wood was held not to be admissible. *Blackett, Baronet, v. Mary Anne Lowes*, *E. 54 G. 3.* 494
7. Upon an indictment against the parish of *H.* for not repairing a highway, an award made by commissioners under an inclosure act, which awarded the highway to be in a different parish, was holden not to be admissible evidence for the defendants, without shewing that the commissioners had given the previous notices required by the act before they ascertained

- the boundaries: it appearing that the usage had not been pursuant to the award, the defendants having since the award, as well as before, repaired the highway. *The King v. The Inhabitants of Haslingfield*, *E. 54 G. 3.* Page 558
8. In an action by plaintiff claiming under an elegit for use and occupation, an examined copy of the judgment roll, containing the award of elegit and return of the inquisition, is evidence of plaintiff's title, without proving a copy of the elegit and of the inquisition. *Ramsbottom and Others, v. Buckhurst*, *E. 54 G. 3.* 565

## EXECUTION,

*See* ESCAPE. ERROR, WRIT OF.  
PRACTICE, 3.

## FACTOR.

1. Where plaintiffs consigned goods to their factor, who not having funds to pay the freight and duties, agreed with defendants that they should take charge of the consignment, pay the freight and duties, and sell the goods, and have one half the usual commission on such sale; and defendants accordingly paid the freight and duties, and received the goods, after which the factors became bankrupt, having before informed defendants that the goods were the plaintiffs'; but defendants notwithstanding sold the goods: held that on trover by the plaintiffs, the defendants had not a right to retain for the freight and duties after deducting the balance due from the factors to the plaintiffs at the time of the bankruptcy. *Solly and Another v. Rathbone and Others*, *H. 54 G. 3.* 298
2. Where *C.* consigned goods to *M.* their broker, upon a *del credere* commission, for sale, and drew bills

bills on him in advance, which *M.* accepted but never paid, and afterwards without the knowledge of *C.*, placed the goods with *H.*, another broker, upon a *del credere* commission, and upon an agreement to divide the commission with him, and obtained his acceptances for the amount, and *H.* sold the goods; and afterwards became bankrupt, and his assignees received the proceeds of those sales, and the acceptances of *H.* were proved under his commission, and a dividend received upon them: held that the assignees of *H.* were liable to the assignee of *C.* who had also become bankrupt, for the amount of the proceeds, in an action for money had and received. *Cockran, Assignee of Campbell and Orr, bankrupts, v. Irlam and Others, E. 53 G. 3.* Page 301

## FALSE PRETENCES,

See INDICTMENT.

## FORFEITURE,

See LEASE, I. WASTE.

## FRAUDS, STATUTE OF,

See INFANT.

A bill of parcels, in which the name of the vendor is printed, and that of the vendee written by the vendor is a sufficient memorandum of the contract within the statute of frauds to charge the vendor. *Schneider v. Norris, H. 54 G. 3.* 286

## FREIGHT,

See INSURANCE, 7.

Where a ship was chartered on a voyage out and home for a specified time, at a certain rate of payment on the homeward cargo in full

for the hire of the ship for the said time, to be paid in part by an advance on the ship's clearing for the outward voyage, and the rest on her return, by bills payable at a future day, and on the loading the homeward cargo, a bill of lading was signed to deliver the goods to the charterers or their assigns, he or they paying freight for the said goods as per charter-party: held that the indorsees of the bill of lading, for valuable consideration, were not liable to the ship owner upon an implied assumpsit to pay the freight arising out of the receipt of the goods under the bill of lading. *Moorson and Another v. Kymmer and Others, H. 54 G. 3.* Page 303

## GUARANTIE.

A bond entered into by *A.* and *B.* to the plaintiffs, to enable *A.* to carry on his trade, conditioned for the payment of all such sums not exceeding 3000*l.* which should at any time thereafter be advanced by plaintiffs to *A.*, is not a continuing guarantee to the extent of 3000*l.* for advances made at any time, but only a guarantee for advances once made to the extent of 3000*l.* Payments made generally to the plaintiffs on the account of *A.* may be applied by them in liquidation of a balance existing against *A.* before the execution of the bond, and *B.* cannot insist upon their being applied in exoneration of his liability on the bond, although at the time of his entering into it, plaintiffs did not give him notice that any balance was then existing against *A.* *Kirby and Others v. The Duke of Marlborough and Another, M. 54 G. 3.* 18

## HABEAS CORPUS,

## See RECORD.

1. A return to a habeas corpus for the discharge of an apprentice above the age of twenty-one, stating the custom of *London*, that every citizen and freeman of the city may take as an apprentice any person above the age of fourteen and under twenty-one, to serve for seven years or more, must shew that the apprentice was within those ages when he bound himself apprentice; for the Court will not intend that from matter dehors the return. *John William Eden's Case*, M. 54 G. 3. Page 226
2. The Court refused leave to amend the return *ib.*
3. Quære, whether an apprentice by the custom of *London* is compellable to serve after twenty-one *ib.*
4. The Court granted a rule nisi for a habeas corpus on behalf of an officer under military arrest for charges of misconduct, on an affidavit complaining that he had not been brought to trial pursuant to the 23d article of war, as soon as a court martial could be conveniently assembled; but it being stated upon the affidavit of the Judge Advocate General, in answer, that proceedings were instituted as soon as could conveniently be, and according to the course of office, and that the trial had been postponed partly on account of the absence of the prisoner's witnesses, the Court discharged the rule. *Richard Blake's Case*, H. 54 G. 3. 428
5. *S. P. Humphrey Wade's Case*, H. 24 G. 3. 429 n.
6. Application for a habeas corpus under the 43 G. 3. c. 140. ought to be made to a judge out of Court. *Gordon's Case*, E. 54 G. 3. 582

## HEREFORDSHIRE.

*Herefordshire* is the next adjoining English county to *South Wales* for the trial of issues arising there; therefore where on ejectment for lands in *Cardigan* the venire was awarded out of *Salop*, and objection was thereupon made at the trial, and a verdict found for the plaintiff, the Court arrested the judgment: and though it appeared that *Salop* was in fact nearer to the lands in question, and more easy of access, that was held not to vary the practice. *Goodright on the demise of Richards v. Williams*; H. 54 G. 3. Page 270

## HUSBAND &amp; WIFE.

Husband and wife may sue on a promissory note made to the wife during coverture. *Philliskirk and Susannah his wife v. Pluckwell*, H. 54 G. 3. 393

## HUSTINGS.

A person who is nominated and elected to serve in parliament for the city of *Westminster* without being present at, or in any way interfering himself, or by his agents, with the election, or holding himself out, or authorizing any one else to hold him out as a candidate, but afterwards takes his seat in the House of Commons, is not chargeable under stat. 51 G. 3. c. 126. with the expences of the hustings. *Morris v. Sir Francis Burdett*, M. 54 G. 3. 212

## INCLOSURE-ACT,

See APPEAL, I. EVIDENCE, 7.

1. A private inclosure act, which gives an appeal to the quarter sessions within four months after the cause of complaint shall have arisen, to the party grieved by any thing done

done in pursuance of that or of the general inclosure act (other than and except such determinations as are by that or by the general inclosure act declared to be binding, final, and conclusive) does not give any appeal to a party complaining that the commissioners have omitted to set out a particular road as a public road, against their determination: and supposing it did, yet he must appeal within 4 months, and cannot after that time when the commissioners set out the road as a private road appeal against that determination, his cause of complaint being that it is not set out as a public road, and not that it is set out as a private road. *The King v. The Commissioners for inclosing Lands in the parish of Dean, in the County of Cumberland, M.* 54 G. 3. Page 80

2. Where allotments were made and awarded to *W. L.*, in respect of several customary estates, of which he was seised in fee according to the custom of the manor, under an agreement between the lord of the manor and the commoners, and an award made thereon, which were confirmed by an inclosure act, and which agreement contained a clause saving to the lord all mines, and all royalties and privileges in tam amplo modo as he had enjoyed the same within the ancient customary tenements, and the award contained also a clause saving to the lord all seignories and royalties incident to the manor, and the act saved to him all rents, services, courts, &c. and all other royalties, jurisdictions, and pre-eminences incident to the manor in tam amplo modo as he might have enjoyed the same in case the act had not been made; and also contained a clause that nothing should alter or annul any settlements, &c. affect-

ing the lands to be inclosed, but that the several allotments should be held by the several persons to whom allotted to the same uses, and for the same estates, and subject to such limitations, &c. as the lands in respect of which such allotments were made, were limited to: held that the allotments so made were freehold and not customary estate; and therefore were not within the custom of the manor, that customary estates are not deviseable by will. *Doe d. Lowes v. Davidson, M.* 54 G. 3. Page 175

3. A lord of the manor was held entitled to an allotment under an inclosure act, in respect of his demesnes of the manor, over and above the allotment awarded to him by the act in respect of his right as lord of the manor. *Arundell v. Viscount Falmouth, E.* 54 G. 3. Page 440

## INDICTMENT.

An indictment on 30 G. 2. c. 24. for obtaining money by false pretences, must negative by special averment the truth of the pretences; it is not enough to charge that the defendant *falsely pretended*, &c. (setting forth the pretences), by means of which *said false pretences* he obtained the money, &c.; therefore for want of such averment in the indictment the Court reversed the judgment. *The King v. H. D. Perrott, H.* 54 G. 3. 379

## INFANT.

An Infant may sue on a contract in part executed by him, and which is for his benefit; therefore where defendant on the 12th of October agreed to sell to plaintiff (an infant) all the potatoes then growing on three acres at so much per acre, to be dug up and carried away by plaintiff.



plaintiff, and plaintiff paid 40*l.* to defendant under the agreement, and dug a part and carried away a part of those dug, but was prevented by the defendant from digging and carrying away the residue: Held that he was entitled to recover for this breach of the agreement; and that such agreement (being by parol) was not within the 4th section of the statute of frauds. *Warwick (an Infant) by J. Monteith, his next friend, v. Bruce*, M. 54 G. 3. Page 205

### INSOLVENT DEBTOR.

1. Defendant in custody on an attachment for non-payment of money awarded by the Master to the prosecutor of an indictment for an assault, of which defendant is convicted, is not entitled to his discharge under 48 G. 3. c. 123. after having been in prison 12 calendar months, although the sum awarded for damages do not exceed 20*l.* exclusive of costs. *The King v. Charles Dunne*, M. 54 G. 3. 201
2. A person discharged under 51 G. 3. c. 125. (insolvent act,) is liable to his surety for the arrears of an annuity due since his discharge, which the surety has been obliged to pay. *Page v. Bussell, E.* 54 G. 3. 551

### INSURANCE,

See SET-OFF, 2.

1. Policy of assurance on goods at and from *London* to the ship's discharging port or ports in the *Baltic*, with liberty to touch at any port or ports for orders or any other purpose, and to touch and stay at any ports or places whatsoever and wheresoever: held that the ship having touched at C. for orders and gone on to S., a more distant port for
- farther orders, and having received orders at S., because it was unsafe to land there to return to C., and wait for orders, might so return to C. without being guilty of a deviation; it being found that she went to S. for orders in the prosecution of her voyage, and returned to C. to obtain orders as to the farther progress of the voyage, and no fraud being found. *Mellish and Another v. Andrews*, M. 54 G. 3. Page 27
2. Policy of insurance on ship and goods at and from *London* to any ports in the *Baltic*, with liberty to carry simulated papers and clearances, and until safely warehoused in the warehouses of the consignees at the port of discharge, at 40 guineas per cent. premium: held that the underwriter was liable for a loss arising from confiscation by the *Prussian* government, notwithstanding the persons in whom the interest was averred were *Prussian* subjects, *Prussia* not being at war with this country; it being found that at the time of effecting the policy all direct commerce between this country and the ports in the *Baltic* was prohibited by the powers possessing ports there, but that notwithstanding, an extensive course of commerce was carried on between this country and those ports by means of simulated papers and clearances, which was well known to all descriptions of persons such as plaintiffs and defendant. *Simeon and Others v. Bazett*, M. 54 G. 3. 94
3. Although a licence "to plaintiff of *London*, merchant, on behalf of himself and other *British* and neutral merchants to export on board a certain vessel bearing any flag except the *French*, a specified cargo from *London* to any port in the *Baltic* not under blockade, and to whom-

- whomsoever the property may appear to belong," was held not to protect a part of the cargo which was the property of *Russian* subjects at the time of the shipment, *Russia* being then at war with this country, so as to entitle the plaintiff to recover in respect of that part upon a policy effected by him as the agent for and by the orders of those *Russian* subjects, the loss being occasioned by seizure and confiscation in a *Russian* port by commissioners appointed by the *Russian* government; yet as the licence was also obtained and the policy effected by the plaintiff on his own account, and as agent for certain *Hamburgers* who were respectively interested in separate and distinct proportions of the cargo; held that plaintiff was entitled to recover in respect of his own interest and that of the *Hamburgers*, *Hamburg* being in a state of permissive neutrality with this country. *Hagedorn v. Bazett*, M. 54 G. 3. Page 100
4. Policy of assurance on goods at and from G. to the ship's port of discharge, beginning the adventure on the said goods from the loading thereof aboard the said ship: held that the policy did not cover goods loaded at an anterior port, though they were in a loaded state and in good safety at G. just before effecting the insurance. *Mellish and Another v. Allnut*, M. 54 G. 3. 106
5. Declaration on a policy of assurance on goods at and from L. by land carriage to H., and at and from thence by a packet to G., beginning the adventure on the goods from the loading on board the ship, and averred that the goods were delivered at L. to carriers to be carried from L. by land carriage to H., and by the fraud and negligence of the servants and persons

employed by the carriers were wholly lost: held that this was a loss within the meaning of the policy, which was the usual printed form of marine policy, containing the usual printed enumeration of risks: and that it was not necessary to aver that the goods were loaded at L. to be carried to H. *Boehm and Another v. Combe*, M. 54 G. 3.

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6. Policy of assurance on goods (copper and iron) at and from L. to Q., warranted free of particular average, and the ship, owing to sea damage in the course of her voyage, was obliged to run into port and undergo repair, and some part of the goods were damaged, and the repairs detained her so long as to prevent her reaching Q. that season, and no other ship could be procured at that or a neighbouring port to forward the cargo in time, so that the voyage was abandoned, and the ship afterwards sailed on another voyage: held that this was not a total loss of the goods, and that the assured could not abandon. *Anderson and Another v. Wallis*, M. 54 G. 3. 240
7. Policy on freight, valued, at and from R. and any ports in the *Baltic* to any ports in the United Kingdom, and the ship was chartered with a cargo from L. to some port in the *Baltic* not beyond R., and from thence to R., there to take in a homeward cargo, &c., and sailed from L. and arrived at R., where she was detained for five weeks and prevented from loading by order of the government, and the freighter never loaded her, and a few days after the detention ceased the frost set in, which detained her there till the spring, when she procured a freight from other persons, and returned with it to L., but the expences of her detention exceeded

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ed such freight: held that the policy had attached at the time of the detention, but that freight having been afterwards earned, the underwriter was not liable. *Everth and Another v. Smith*, H. 54 G. 3.

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8. Insurance on ship, and the ship during her voyage while loading her homeward cargo was seized by the crew and carried away to a distant country, and her cargo plundered, and the ship deserted, but was afterwards retaken by another ship, and was brought with a small remaining part of her cargo to an *English* port, (not the port of her destination,) and part of her rigging was gone, and she could not be made fit for a voyage again without considerable expence in providing a crew and stores: held that this was not a total loss so as to entitle the assured to abandon after notice of the recapture. *Falkner and Others v. Ritchie*, H. 54 G. 3. 290

9. Insurance at and from C. to L. on goods, in a ship by name, until the same should be there safely discharged and landed, *rice free of particular average*, and the ship with rice and other goods arrived within the limits of the port of L., but before she could be brought to her moorings or be at all unloaded, ran aground and was wrecked, and the whole cargo was greatly damaged, and was taken out of her in craft, and carried to the consignees at L. and sold, and produced upon the whole little more than sufficient to pay freight and salvage, but the rice did not produce sufficient to pay the freight: held that this was a case of particular average only, and therefore as to the rice the underwriter was exempted by the warranty. *Glennie*

v. *The London Assurance Company*, H. 54 G. 3. Page 371

10. Where plaintiff effected an insurance on ship as well in his own name as for and in the name of all and every other person, &c. in the usual form, for the benefit of S. an alien enemy, and procured a licence to legalize the voyage, and a loss happened, and two years afterwards S. by letter to the plaintiff adopted the insurance: held that the plaintiff might recover against the underwriter, averring the interest in S. *Hagedorn v. Oliverson*, E. 54 G. 3. 485

## INTERROGATORIES,

See WITNESS.

## JUSTICES.

1. Where the guardian and visitor of a parish, which had adopted the provisions of stat. 22 G. 3. c. 83., upon application to them for relief by a pauper for herself and children, directed them to be received into the poor house: held that one justice had not any jurisdiction upon complaint to him by the pauper to order relief out of the poor house; and therefore where defendant was convicted in a penalty for disobeying such order, which conviction was confirmed at the sessions, this court quashed the order of sessions. *The King v. C. Laughton*, H. 54 G. 3. 324
2. If the overseers after allowance of their accounts by two justices at special sessions, and an order by the justices to pay over the balance to their successors, which order is confirmed on appeal, refuse to pay such balance, the two justices may issue their warrant to levy the same under 50 G. 3. c. 49. upon the application of one of the suc-

succeeding overseers, although the rest of the churchwardens and overseers refuse to concur in such application; therefore where the justices refused to issue such warrant upon such application, the Court granted a mandamus. *The King v. Pascoe and Another*, H. 54 G. 3. Page 343

## LEASE.

1. Demise of freehold and copyhold lands at an entire rent, habendum so much as freehold for 21 years, and so much as copyhold for 3 years warranted by the custom, and covenant for renewal of the lease of the copyhold every 3 years, toties quoties during the 21 years under the like covenants, and that in the mean time and until such new leases should be executed, the lessee should hold the said land as well copyhold as freehold, &c.: held that this was only a lease of the copyhold for 3 years, and that the lessor after the 3 years might recover the premises in ejectment against the lessee, there not having been any fresh lease granted. *Fenny on the demise of Eastham, Widow, v. Child*, H. 54 G. 3. 255
2. Lease of lands of which lessor was seised in fee, and of other lands of which he was seised for life with a power of leasing, at one entire rent, and the lease not well executed according to the power: held that the lease was good after the death of lessor for the lands in fee, though not for the other lands, for the rent may be apportioned. *Doe d. Vaughan v. Meyler*, H. 54 G. 3. 276
3. Lease dated two days before release good to support release which refers to a lease as of the day next before the date of release. *Rams-*

*bottom and Others, v. Tunbridge*, E. 54 G. 3. Page 434

4. Upon a lease reserving rent payable quarterly, with a proviso, that if the rent be in arrear 21 days next after day of payment, being lawfully demanded, the lessor may re-enter: Held that five quarters being in arrear, and no sufficient distress on the premises, lessor might re-enter without a demand. *Dissentient Ld. Ellenborough, C. J. Doe d. Scholefield and Others v. Alexander*, E. 54 G. 3. 525
5. Lease of land for term of years with a covenant by lessee that if lessor should be desirous during the term to take all or any part of the land for building thereon, &c. it should be lawful for her to come into and enter upon all or any part to make such buildings as she should think proper, and to do all necessary acts without interruption by lessee, provided lessor gave six months' notice of such intention, with a proviso also that the lease should be void for non-performance of covenants: held that lessor having agreed with a third person to the terms of a building contract, might give six months' notice of her intention to take the whole of the land for building, and at the expiration of that time, and after refusal by the tenant to deliver up possession, might bring ejectment. *Doe d. Lady Wilson v. Abel*, E. 54 G. 3. 541

## MANDAMUS.

*See APPEAL. JUSTICES, 2. Quo Warranto, 6.*

1. It seems that an indictment against the commissioners, for not obeying an order of sessions directing them to set out the road as a public road, would not be such a remedy to the party, supposing him entitled to have

- have the road so set out as would make the Court refuse to interfere by mandamus *The King v. The Commissioners for inclosing Lands in the Parish of Dean, in the County of Cumberland*, M. 54 G. 3. Page 80
2. The Court refused a mandamus to the officers of the customs to register a ship transferred by the survivor of two part-owners, merchants, on the ground that the executors of the deceased part-owner ought to have joined in the transfer. *The King v. the Collector and Comptroller of the Customs at Liverpool*, M. 54 G. 3. 223

## MARRIAGE,

See ADMINISTRATOR.

## MESNE PROFITS,

See ESCAPE.

## MESSENGER UNDER COMMISSION,

See ATTORNEY.

## MISJOINDER.

If there be a misjoinder of counts, and a verdict for plaintiff on the counts well joined, and for the defendant on the others, the misjoinder is not a cause for arresting the judgment. *Kightley v. Birch*, E. 54 G. 3. 533

## MONEY HAD AND RECEIVED,

See FACTOR, 2.

## NOLLE PROSEQUI.

In assumpsit against two, where one pleads *non assumpsit* and a plea of bankruptcy, and the plaintiff enters a nolle prosequi as to him, as to the several matters pleaded by him, and the other defendant pleads *non assumpsit*, the latter is not discharged by the nolle prosequi. *Moravia and another v.*

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*D. Hunter and J. W. Glass*, E. 54 G. 3. Page 444

## NON RESIDENCE,

See PLEADING, 8.

## NOTICE,

See TRESPASS.

A notice to quit in writing signed by the party giving it, and attested by a witness, must be proved by calling that witness, or his absence must be accounted for; proof that it was served on the tenant, that he read it, and did not object to it, is not sufficient. *Doe d. Sr. F. Sykes and R. Benyon v. Durnford*, M. 54 G. 3. 62

## OVERSEERS,

See JUSTICES, 1, 2.

## OVERSEERS ACCOUNTS,

See AFFIDAVIT, 2. JUSTICES, 2.

Overseers cannot charge in their accounts for money paid as a salary to one of the overseers; and where the order of sessions confirming the accounts was in this form, "Upon the appeal of G. against the accounts of H. and W., overseers, whereby he the said G. objected to the sum of 12*l.* 10*s.* in the said accounts paid to W. as a salary, it is ordered that the said accounts be confirmed:" this was considered as an order confirming the accounts in respect of the charge for the salary, and therefore the Court quashed the order; but sent the case back to be reheard as to the nature of the payment. *The King v. Glyde*, H. 53 G. 3. 323

## OYSTER FISHERY,

See BYE-LAW.

The stat. 3 Jac. 1. c. 12. which prohibits persons from "willingly taking, destroying, or spoiling any spawn,

spawn, fry, or brood of any sea-fish in any wear, or other engine or device whatsoever" seems not to comprehend shell-fish, and if it does, it means a taking for destruction, and not a taking of oyster spawn for the purpose of removing it to beds for farther growth and maturity to make it marketable. *Bridger v. Richardson*, *E. 54 G. 3.* Page 568

PARLIAMENT,

See HUSTINGS.

PARTNERS,

See BANKRUPT, 7. COVENANT, MANDAMUS, 2.

PAYMENT OF MONEY INTO COURT,

See COSTS, 3.

Payment of money into Court generally upon a declaration containing a count on a policy of assurance, and the money counts, is only an admission of the contract, but does not preclude the defendant from disputing his liability, beyond such payment, for goods which were not loaded according to the terms of the policy. *Mellish and another v. Allnutt*, *M. 54 G. 3.* 106

PLEADING,

See COSTS, 1. NOLLE PROSEQUI.

1. Joint contractors must be all sued, although one has become bankrupt and obtained his certificate; and if not sued, the others may plead in abatement. *Bovill and Another v. John Wood the elder, and John Wood the younger*, *M. 54 G. 3.* 23
2. Trespass for breaking and entering plaintiff's dwelling house may be well laid to have been done under

a false charge and assertion that plaintiff had stolen property in her house, per quod she was injured in her credit, &c. for that is laid only as matter of aggravation: and the jury may give damages for the trespass as it is aggravated by such false charge. *Bracegirdle v. Orford and Others*, *M. 54 G. 3.* 77

3. A bankrupt cannot be permitted in an action brought by him to try the validity of the commission to plead a prior act of bankruptcy, and a sufficient petitioning creditor's debt existing at that time to support a commission, in order to defeat the subsisting commission. *Bryant v. Withers*, *M. 54 G. 3.* 126
4. The statute written in the statute book under the year secundo (vulgo primo) *Jac. 1. c. 15.* must be pleaded as of the first year, *ib.*
5. A general plea of usury held ill on special demurrer. *Hill v. Montagu*, *H. 54 G. 3.* 377
6. A count for beating the plaintiff's servant per quod servitium amisit may be joined with counts in trespass. *Ditcham v. Bond*, *E. 54 G. 3.* 436
7. Plea in abatement after general imparlance is bad, and may be taken advantage of on special demurrer though not assigned as a cause. *Lloyd v. Williams and Others*, *E. 54 G. 3.* 484
8. The stat 43 G. 3. c. 84. which prohibits under a penalty a spiritual person from absenting himself from his benefice for more than a certain time in any one year, means year from the time when the action is brought for the penalty. In such action it is not necessary to allege in the declaration that the benefice has the cure of souls; and its being alleged that he absented himself for a period exceeding eight months together,

together, (to wit,) on the 10th Oct. 1810 for the space of nine months then next following is sufficiently certain of the time of absence, for it shall be intended to be more than eight months immediately consecutive to the 10th Oct., the jury having found a verdict for a penalty corresponding with that period of absence. The annual value means average annual value. A prebend is a benefice within the statute. *Cathcart, Clerk, v. Hardy, E. 54 G. 3. Page 534*

9. After a general plea of bankruptcy concluding to the country, a replication that defendant was before the commission discharged as a bankrupt, and that his estate has not produced 15s. in the pound, which was pleaded in maintenance of the action generally, and with a verification, was held ill on special demurrer. *Wilson and Another, v. Kemp, E. 54 G. 3. 549*

10. Assumpsit by administrator upon promises laid to the intestate, with a profert of the letters of administration, and non assumpsit pleaded, the defendant cannot, upon the production of the letters of administration, object that they are not properly stamped, for the plea admits that the plaintiff is administrator. *Thynne, administrator, &c. of A. Thynne v. Protheroe, E. 54 G. 3. 553*

11. A plea of set off for money due on a recognizance, and also for money due upon promises pleaded to an action of debt on bond as if to an action of assumpsit, was holden to be a nullity, and that the plaintiff might sign judgment. *Penfold v. Hawkins, E. 54 G. 3. 606*

## POOR-HOUSE,

See JUSTICES, 1.

## PRACTICE.

### POUNDAGE,

See SHERIFF, 2.

### POWER.

Where lands were settled to the use of such person or persons, &c., as *R. P.* and *T. P.* should, during their joint lives, by any deed or writing under both their hands and seals, to be by them duly executed in the presence of, and to be attested by two witnesses, limit and appoint, and until such appointment to the use of *R. P.* for life, remainder to the use of *T. P.* for life, and they by deed, signed, sealed, and delivered by them, in the presence of two witnesses appointed the land to *J. M.*, but the attestation indorsed on the deed, and subscribed by the witnesses, only specified that it was sealed and delivered by *R. P.* and *T. P.* in their presence, but not that it was signed: held that this was not a due attestation as required by the power; and that a subsequent attestation by the witnesses, after the death of *R. P.*, certifying that the deed was signed as well as sealed and delivered in their presence, did not cure the defect in the original attestation. *Doe d. Mansfield v. Peach, E. 54 G. 3. Page 576*

## PRACTICE,

See AFFIDAVIT *passim*. ATTACHMENT. BAIL. ERROR, WRIT OF, *passim*. QUO WARRANTO, 3. PLEADING, 11. RECORD. SHERIFF.

1. Affidavit to hold to bail, "that defendant is indebted to plaintiff in 450l. as indorsee of a promissory note made by defendant," without stating the date of the note, or that it was payable on demand, or that it was due or payable at a day then

- then past is insufficient. *Jackson v. Yate, M. 54 G. 3. Page 148*
2. Herefordshire is the next adjoining English county to South Wales for the trial of issues arising there; therefore where on ejectment for lands in Cardigan the Venire was awarded out of Salop, and objection was thereupon made at the trial, and a verdict was found for the plaintiff, the Court arrested the judgment, and though it appeared that Salop was in fact nearer to the lands in question, and more easy of access, that was held not to vary the practice. *Goodright on the demise of Richards v. Williams, H. 54 G. 3. 270*
  3. If plaintiff sue the bail by action, and take them in execution, he cannot afterwards take the principal, though one of the bail become bankrupt and be discharged, and the other also be discharged on payment of 5s. in the pound, and upon an understanding that the plaintiff was at liberty to proceed against the principal. *Allen v. Snow, H. 54 G. 3. 341*

## PREBEND,

See PLEADING, 8.

## PRIZE.

Where the admiral commanding on the *Cork* station issued orders to the captain of a frigate on that station to go on a particular service, and afterwards to cruise within certain limits for six weeks, and the frigate after performing the service began her cruise, and returned with a prize to *Cork*, and afterwards the admiral being directed by the admiralty to take one of the frigates and proceed to *Plymouth* for further orders, and to direct another admiral to take the command, did accordingly direct

another admiral to take under his command the frigate, among others, and afterwards took himself the said frigate, and sailed in her to *Plymouth*, and was appointed commander of the channel fleet, and issued an order to the captain of the frigate to cruise for a particular purpose for a week, and at the expiration of that time to proceed in execution of the former orders which he had received from him; and the frigate sailed from *Plymouth*, and afterwards arrived within the limits prescribed by the former orders (which were taken to be within the limits of the *Cork* station,) and made two captures, one within and another without those limits: held that the admiral so appointed and commanding on the *Cork* station at the time of the captures was entitled to the flag 8th of that which was captured within the limits, not as being privy to the former orders (which orders were not suspended by the last order, and again subsisting at the time of the capture, but were expired by efflux of time,) but as admiral of the station within the limits of which the said frigate had made the capture. *Drury and Others, executors of W. O'Brien, Drury, deceased, v. Lady Gardner and Others, executors of Lord Gardner, M. 54 G. 3. Page 150*

## PROMISSORY NOTES,

See BILLS OF EXCHANGE.

PROMOTIONS, Pages 251, 253, 254, 433, 616.

## QUO WARRANTO,

See CORPORATION, *passim*.

1. The 32 G. 3. c. 58. which enables a person to plead that he held or executed



- executed an office 6 years before exhibiting a quo warranto information, means 6 years before making the rule absolute for the information, and not 6 years before obtaining the rule nisi; and therefore the Court refused to make the rule absolute where the 6 years had then elapsed, though they had not elapsed before the rule nisi. But a title to one office which is a qualification to hold another office is not within s. 3. of the statute respecting derivative titles, and therefore although the party had exercised the first for 6 years, the Court made the rule absolute for an information for exercising the second office upon a defect of title to the first. *The King v. Stokes, M. 54 G. 3. Page 71*
2. The Court will make the rule for a quo warranto information absolute, although the party has since the rule obtained resigned his office, and his resignation has been accepted. The Court will not consolidate several informations against several persons for distinct offices, for there must be an information against each to enable each to disclaim. *The King v. Warlow, M. 54 G. 3. 75*
3. The Court will not stay proceedings in a quo warranto information until the prosecutor give security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator, and no fraud is suggested. *The King, on the relation of Thomas Crane, v. Sir W. W. Wynne, Bart., H. 54 G. 3. 346*
4. Where a charter of incorporation, ordained that the mayor, &c. should yearly be chosen justices within the borough, and that the said justices should not permit any one to retail ale or beer within

the borough, without a licence under the hands of two of the said justices, whereof the mayor to be one: held that the defendant who was a dealer in spirituous liquors, and by that means disqualified by 26 G. 2. c. 13. from concurring in granting licences, was not disqualified from being elected mayor. *The King v. W. Smith, E. 54 G. 3. Page 583*

5. If defendant sets out a charter authorising the election of a mayor in two instances only, viz. on the annual charter day and on the mayor's death within the year after he is sworn in, and pleads that the office of mayor became vacant, without shewing how it became vacant, it cannot be intended that it was a vacancy within either of the instances named, nor that in instances not named there was to be an election in the mode prescribed in the instances named. *ib.*
6. A mandamus directed not to a corporation by its corporate name, but to more persons than are by the charter required to do the thing enjoined by the mandamus, seems ill. *ib.*
7. If a corporation consist of a definite number of aldermen, of whom the mayor is one, and it is pleaded that the office of mayor became vacant, it is not to be inferred from thence that the number of aldermen did not remain complete; and therefore the plea averring an election by the residue of the aldermen, which might consist of 10 or less according to the circumstance, whether the vacancy of mayor made a vacancy of alderman, it was held a good replication that only five attended; for it was matter of rejoinder that under the circumstances five were a majority: secus where it was pleaded that

that the mayor died, for there the presumption was, that there was a vacancy of alderman. Page 583

8. Where a charter authorized the election of a mayor on the charter day, with power to the mayor to hold over, and on the mayor's death within the year after his election and swearing in, and in the mean-time the alderman next in order to officiate as mayor: Held that in the case of a mayor's holding over and dying more than a year after his election and swearing in, the charter did not authorize a new election of a mayor, nor the alderman next in order to officiate as mayor; but it was *casus omissus*. *ib.*

RECORD.

The Court will not compel the marshal to affile of record a writ of *habeas corpus cum causa*, by virtue of which a person is committed to his custody in execution. *Cooper v. Jones*, *M. 54 G.3.* 202

RE-ENTRY,

*See LEASE, 4. WASTE.*

REGISTER,

*See MANDAMUS, 2. SHIP.*

RELEASE,

*See LEASE, 3.*

REPUBLICATION,

*See WILL.*

RESIDENCE,

*See CORPORATION, 2.*

SALE.

Where plaintiffs sold ten out of eighteen tons of flax, then lying in mats at defendants' wharf, at so much per ton, to be paid for by the vendee's acceptance at three

month's, and gave vendee an order on defendants (the wharfingers) to deliver ten tons to vendee or order, which defendants entered in their books, but the quantity to be delivered was to be ascertained by the wharfinger's weighing it, (the mats being of unequal quantities, so that a fraction of a mat might be required,) and an allowance for tare and draft was to be made by the weight: Held that the sale was not complete to pass the property, those acts not having been done by the wharfingers, nor any delivery made; and that the plaintiffs, upon the insolvency of the vendee, might countermand the delivery. *Busk and another v. Davis and another*, *H. 54 G.3.*

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SESSIONS,

*See AFFIDAVIT, 2. APPEAL, 1. OVERSEERS' ACCOUNTS. SETTLEMENT BY HIRING AND SERVICE, 3.*

SET-OFF,

*See PLEADING, 11.*

1. Where defendants insurance brokers effected several policies of assurance, some in the name and on account of their own firm, others in the name of their own firm but on account of their principals, and others in the name and on account of their principals, for which principals they acted under a *del credere* commission, without the knowledge of the underwriters: held, that in an action brought against them for premiums by the assignees of one of the underwriters upon those policies, who had become bankrupt, the defendants might set-off losses and returns due on all such of those policies as were effected in the name of their own firm, but not on such as were effected

fectured in the names of the principals, such losses and returns having become due on those policies before the time when the bankrupt stopped payment, though they had never been adjusted by the bankrupt, but only by the other underwriters between the time of his stopping payment and committing the act of bankruptcy, on which adjustment the defendants had given their principals credit for the amount. *Koster and others, assignees of Swan (bankrupt) v. Eason*, M. 54 G. 3. Page 112

2. Where brokers effected policies of assurance on goods on account of their principals, but in their own names, and accepted bills drawn on them on account of the goods which were consigned to them, and lost before arrival: held that they might set-off such losses in satisfaction brought by the assignees of the underwriter, (since a bankrupt) for premiums, although they had not any commission del credere, and the losses were not adjusted. *W. Parker and others, Assignees of S. Parker a Bankrupt, v. Beasley and Walter Bell*, H. 54 G. 3. 423
3. In assumpsit for goods sold and delivered, defendant may set-off money due upon plaintiff's acceptance, of which defendant has become holder since the sale, and before delivery of the goods, though he has agreed to give plaintiff ready money for them. *Cornforth v. Rivett*, E. 54 G. 3. 510

#### SETTLEMENT—BY APPRENTICESHIP.

1. Where an apprentice who worked and slept at his masters' works in C. at weekly wages, went with their knowledge on Saturdays and Sundays to R., and slept there, and returned to his work on Mon-

days, and was received by them, and on the Saturday afternoon before *Shrove Tuesday* (having the night before slept at C.) received his pay and never returned again to the service, and slept that and the following night at R., but on quitting the works on Saturday had not formed any intention not to return, nor had he on the Sunday, nor could he fix the time when he determined not to return: held that his settlement was at C., his service having ended on his quitting on Saturday. *The King v. The Inhabitants of Ribchester*, M. 54 G. 3. Page 135

2. An indenture binding out an apprentice with the consent of the trustees of certain funds bequeathed for the binding out poor apprentices, which was executed by the apprentice and the master, and recited the trustees to be parties, and in which the consideration paid by the trustees to the master was stated to be 20*l.*, was held to confer a settlement, though it was not executed by the trustees, and though the master actually received only 16*l.* 15*s.* 6*d.* the residue being retained by the agent of the trustees for costs and expences of the binding. *The King v. The Inhabitants of Quainton*, H. 54 G. 3. 338
3. Where the father agreed with R. that R. should take his son for six years, to teach him the trade of a frame-work knitter, and he was to allow R. 9*s.* a week for the first three years, for teaching him and his board and lodging: held, that this was a defective contract of apprenticeship, and therefore the son, did not gain a settlement under it. *The King v. The Inhabitants of Mount Sorrell*, E. 54 G. 3. 460
4. Where the parish officers wishing to

to put out a child of the age of nine years as apprentice, upon the refusal of his mother withdrew her parish allowance, but two years afterwards she not being able to support him went to the parish officer and consented to her son's being put out, and by desire of the parish officer chose a master, to whom the parish officer agreed to give three guineas, &c., and afterwards all the parties met and went before the justices, who thinking that the master had already a sufficient number of apprentices, refused to bind the son, whereupon the parish officer, declaring that if he could not have him bound there he would elsewhere, took the parties to an inn, and procured an indenture, which was filled up and executed, and the son with his mother's consent bound himself for seven years: held that the sessions were not warranted in finding fraud so as to defeat the settlement under the indenture. *The King v. The Inhabitants of Kilby*, E. 54 G. 3. Page 501

#### SETTLEMENT—BY CERTIFICATE,

See SETTLEMENT—BY HIRING AND SERVICE, 2.

A parish certificate of more than 30 years date, acknowledging the pauper's grandfather and father to belong to the appellant parish, produced by a rated inhabitant who was overseer of the respondent parish, was held to be evidence, though it was objected that some account should be given of it, and that the witness was not competent to give that account; and it seems that if necessary he might be examined as to the custody. *The King v. The Inhabitants of the Township of Netherthong*, H. 54 G. 3. 337  
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#### SETTLEMENT—BY ESTATE.

1. Where a son having agreed to purchase a piece of land for 65*l.* applied to his father, who consented to advance 20*l.* left to his wife, on condition, that a house should be built by the son on the land, which the father and mother were to have for their lives and the life of the survivor, and afterwards the same to go to the son, but the father and mother were not to sell or dispose of it, nor to take any other family into the house; but this agreement was only by parol; and afterwards the father advanced the 20*l.*, and the son completed the purchase, and the land was conveyed to him in fee, and he built a house, of which the father and mother took possession with his consent, and lived in it for three years, without paying any rent, when the father died, and the mother continued in possession: held, that the father did not gain a settlement by the residence on the land, nor was the mother entitled to reside on it irremovably. *The King v. The Inhabitants of Standon*, E. 54 G. 3. 461
2. The mother of an infant copyholder under 14, was holden to be guardian by law of the copyhold, there being no custom of the manor for appointing a guardian, and therefore entitled to reside irremovably on the estate. A grant of parcel of the waste of the manor to hold to B. and his heirs by way of increase to his copyhold, by such services as the copyhold was subject to, for which B. paid a fine of 10*s.*, was held not to enure as copyhold, there being no custom to warrant such grant nor as an estate in fee-simple. *Quere*, if separate purchases may be added together, to make one purchase  
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chase of 30*l.* within stat. 9 G. 1. c. 7. s. 5. *The King v. the Inhabitants of Wilby*, E. 54 G. 3.

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### SETTLEMENT — BY HIRING AND SERVICE.

1. Where a servant under a yearly hiring served two months, and was then committed and imprisoned under stat. 20 G. 2. c. 19. for misbehaviour to his master, and at the instance of his master, and after nine days imprisonment, was upon the application of his master discharged, and returned to him, and served him as before, and no mention was made of the terms on which he was to serve, and he served in the whole from the time of the hiring for about 19 months: held that the commitment and imprisonment were not a dissolution of the contract, or such an interruption of the service as to prevent a settlement, and therefore he gained a settlement by such hiring and service, although he was married when he returned to his master, and received no wages for the time he was in custody. *The King v. the Inhabitants of Barton-upon-Irwell*, H. 54 G. 3.

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2. The son of a certificated person, who was not named in the certificate, upon the death of his father, being then resident with his mother under the certificate, was bound apprentice in the certifying parish, left his father's family, and served in that parish under the indentures for some years, and then returned, with his master's consent, to serve a person in the certified parish, where his mother and family resided under the certificate, and served that person until the expiration of his indentures, at which time, being of the

age of 21, his mother still residing in the parish, he hired himself to the same person for a year, and served that and three successive years, in the certified parish: held that he gained a settlement by such hiring and service. *The King v. the Inhabitants of the Township of Morley*, H. 54 G. 3.

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3. This court will not upon a case stated presume a hiring for a year, for that is a fact to be found by the sessions. *The King v. the Inhabitants of Seacroft*, E. 54 G. 3.

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### SETTLEMENT — by a tenement of 1*ol.* a year.

1. Renting a certain number of lugs of land at so much per lug, for the purpose of planting potatoes, where the pauper agreed to take the land of the landlord ready ploughed and manured, and when he entered upon it, it was quite prepared, was held to be a renting of land of a yearly value, as it was increased by being ploughed and manured by the landlord, although when the pauper took it the ploughing and manuring was begun, but not finished. *The King v. the Inhabitants of West Cramore*, M. 54 G. 3.

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2. By stat. 51 G. 3. c. 107. (respecting the parish of Clapham) where the yearly rent or value of any house in the parish shall not amount to 20*l.*, or where any house (of whatever yearly rent or value) shall be let out to weekly or monthly tenants, at a rent payable at a shorter period than quarterly, or shall be let out in whole or in part in lodgings, the churchwardens, &c. may compound with the landlord for the parochial rates at a reduced rental, and if the land-

landlord shall refuse to compound he shall be deemed the occupier, and shall be rated and pay the same, and his goods and also the goods of his tenant shall be distrained for the same, and the tenant shall deduct the same: Proviso that no tenant of any house as before mentioned shall, by reason of his residing in or occupying the same, or by payment of any such rate in manner aforesaid, or which shall have been compounded for, be deemed to acquire a settlement in the parish, but in every such case the landlord shall be deemed to have paid the same, &c.: held that this proviso did not restrain a person from gaining a settlement in the parish, by occupying a house at the yearly rent of 12 guineas, which was not compounded for nor refused to be compounded for.

*The King v. the Inhabitants of Streatham, E. 54 G. 3. Page 468*

3. Where a person engaged himself as waiter at an hotel, and had the tap or privilege of selling malt liquors there, and the use of the cellar for holding the liquors, which had a separate entrance, and of which he kept the key, and paid for his situation of waiter, and for the tap and cellar, the yearly sum of 60l.: held that this was not such an occupation of the cellar as to confer a settlement. *The King v. the Inhabitants of Seacroft, E. 54 G. 3. 472*

## SHELL-FISH.

The stat. 3 J. 1. c. 12., which prohibits persons from "willingly taking, destroying, or spoiling any spawn, fry, or brood of any sea-fish in any wear or other engine or device whatsoever," seems not to comprehend shell-fish, and if it does, it means a taking for de-

struction, and not a taking of oyster spawn for the purpose of removing it to beds, for further growth and maturity to make it marketable. *Bridger, q. t., &c. v. Richardson, E. 54 G. 3. Page 568*

## SHERIFF,

See ATTACHMENT.

1. A return by the sheriff of non est inventus procured by the plaintiff against the principal, in order to ground proceedings against the bail, is irregular, if the principal be at that time in custody of the same sheriff on a criminal charge; and the Court set aside the proceedings against the bail with costs where the plaintiff knew that the principal was in such custody at the time of such return. *Ward v. Brumfit and Eastwood, Bail of Rhodes, M. 54 G. 3. 238*
2. Upon a capias utlagatum on mesne process under which the sheriff has seized and taken an inquisition, but there has been no venditioni exponas, the sheriff is not entitled to poundage. *Graham and Another v. Grill, H. 54 G. 3. 294*

## SHIP,

See MANDAMUS, 2.

A bill of sale of 3-4th parts of a ship, then being in the port to which she belongs, executed by three of four joint-owners, transfers the property to the vendee at the time of its execution, if at that time a memorandum of such transfer be indorsed on the certificate of registry, and signed by the three, and a copy of such indorsement be delivered to the proper officer on the next day, and afterwards within a reasonable time the other owner execute the bill of sale and sign the indorsement and a copy of the indorsement signed

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by the four, be left with the proper officer; therefore, where upon a writ of fi. fa. against one of the three the sheriff seized his share after the execution of the bill of sale and signature of the indorsement by the three, but before the delivery of the copy of such indorsement to the proper officer: held that the sheriff might abandon the seizure and return nulla bona. *Palmer and Another v. Moxon*, M. 54 G. 3. Page 43

## SIGNATURE.

A bill of parcels, in which the name of the vendor, is printed, and that of the vendee written by the vendor, is a sufficient memorandum of the contract within the statute of frauds to charge the vendor. *Schneider and Another v. Norris*, H. 54 G. 3. 286

## STAMP,

See SETTLEMENT BY APPRENTICESHIP, 2.

1. A bond conditioned for the payment, by quarterly payments, of an annual rent, is within the 48 G. 3. c. 149. sched. part 1., which imposes a duty on bonds given as a security for the payment of any definite and certain sum of money, and must be stamped accordingly. *Attree v. Anscombe and Others*, M. 54 G. 3. 88
2. A written paper, delivered by the auctioneer to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, but not signed by the auctioneer or any of the parties, was held not to be such a minute of the agreement as was required to be stamped, pursuant to stat. 48 G. 3. c. 149., nor such a writing as

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would exclude parol evidence. *Ramsbottom and Others v. Tunbridge*, E. 54 G. 3. Page 434

3. A written paper, signed by the auctioneer, and delivered to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they are let to the bidder, and the rent payable, must be stamped pursuant to stat. 48 G. 3. c. 149. *Ramsbottom v. Mortley*, E. 54 G. 3. 445

## STATUTES.

The statute written in the statute book under the year secundo (vulgo primo) Jac. 1. c. 15. must be pleaded as of the first year. *Bryant v. Withers*, M. 54 G. 3. 123

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## SURETY,

## See BOND, 2. INSOLVENT DEBTOR, 2.

The obligee of a bond given by principal and surety conditioned for the payment of money by instalments, who has proved under a commission of bankruptcy against the principal the whole debt, and received a dividend thereon of 2s. 7d. in the pound, may recover against the surety an instalment due, making a deduction of 2s. and 7d. on the amount of such instalment, and the surety is not intitled to have the whole dividend applied in discharge of that instalment, but only rateably in part payment of each instalment as it becomes due. *Martin v. Brecknell*, M. 54 G. 3. 39

## TENDER,

## See COPYHOLD.

A tender by the agent of defendant of the whole sum demanded by plaintiff, by pulling out his pocket book, and offering if he would go into



into a neighbouring public house to pay it, which the plaintiff refused to take, is good, although the agent is only authorized by the defendant to tender a sum short of the whole sum demanded, and offers the rest at his own risk.

*Read v. Goldring*, M. 54 G. 3.

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### TITHES.

The rule of law for determining what is barren ground within stat. 2 & 3 Ed. 6. c. 13. is whether the land is of such a nature as to require an extraordinary expence in the manuring or tilling to bring it into a proper state of cultivation; and not whether it is or is not in its nature so fertile, as after being ploughed and sown to produce of itself, without manuring, a tillage or crop worth more than the expence of ploughing, sowing, and reaping. *Warwick and Another v. Collins*, H. 54 G. 3.

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### TRESPASS,

See PLEADING, 2. 6.

Where defendants, in order to levy a poor's rate under a warrant of distress granted by two magistrates, broke and entered the house and broke the windows, &c.: held that they might be sued in trespass without a previous demand of the perusal and copy of the warrant, according to 24 G. 2. c. 44. s. 6. *Bell v. Oakley and 8 Others*, H. 54 G. 3.

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### TRIAL.

See PRACTICE, 2. WITNESS.

### TROVER,

See AFFIDAVIT, 4. FACTOR, 1.

Where by agreement dated 1656, between the lord and certain

tenants of customary tenements within a manor, the tenants covenanted, that they, their heirs or assigns, would not cut down, sell, or dispose of any wood standing or growing, or hereafter to stand or grow, without the licence of the lord, and the lord covenanted to set out yearly, upon request of the tenants, sufficient for the repairing of their houses, &c., and other necessary uses in and about the said tenements, and that in case any of the tenants, their heirs, or assigns, should plant any wood upon the said tenements, it should be lawful for them to cut down, use, and dispose of all or any such wood for repairing their houses, &c., or for any other their necessary uses without disturbance of the lord: held that defendant, who was tenant of one of the customary tenements comprized in the above agreement, was not entitled without licence of the lord to cut down and sell wood which had been planted on the tenement by a tenant since the agreement, and that having so done, the lord might maintain trover against her for the wood. *Blackett, Bart. v. Mary Anne Lowes*, E. 54 G. 3.

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### VENDOR AND VENDEE.

See SALE. SIGNATURE.

### VENUE,

See HEREFORDSHIRE.

The undertaking of the plaintiff upon the usual rule for bringing back the venue to *Middlesex*, is satisfied by the production of the commission of bankruptcy tested at *Westminster. Kensington*, assignee of *T. Chantler*, a bankrupt, v. *T. Chantler the younger*, M. 54 G. 3.

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USURY,

WASTE.

USURY,  
See PLEADING, 54

WALES,  
See HEREFORDSHIRE.

WARRANT OF ATTORNEY.

Warrant of attorney to confess a judgment to three, and one dies, the Court will permit judgment to be entered by the survivors. *Fendall and Others v. May, Bart.*, M. 54 G. 3. Page 76

WASTE..

The lord may enter for waste committed by copyholder for life, though there be an intermediate estate in remainder between the estate of copyholder for life and the lord's reversion. *Doe d. Sir M. B. Folkes and the Dean and Chapter of Exeter v. Clements, M.* 54 G. 3. 68

WITNESS.

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WESTMINSTER, CITY OF,  
See HUSTINGS.

WILL.

A codicil signed by the testator and attested by three witnesses, "to be taken as part of his will", is a republication of the will so as to make the will pass lands contracted for before, but conveyed between the date of the will and codicil. *Goodtitle, d. Edward Woodhouse and James Thomas, and Anne his wife v. John Meredith, M.* 54 G. 3. Page 5

WITNESS,

See SETTLEMENT BY CERTIFICATE.

The Court upon application of the defendant, postponed the trial of an information for a misdemeanor, upon the defendant's consenting by writing under his own hand, to the examination upon interrogatories of a witness for the crown. *Rex v. Morphey, E.* 54 G. 3. 602

END OF THE SECOND VOLUME.











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